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THE

ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

CITED [1951] O.R.

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES
OF
THE SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

Chief Justice of Ontario.

The Honourable ROBERT SPELMAN ROBERTSON (appointed 20th December 1938).

Chief Justice of the High Court.

The Honourable JAMES CHALMERS McRUER (appointed a Justice of Appeal 14th October 1944; appointed Chief Justice of the High Court 28th December 1945).

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ERRATUM.

P. 673. Please substitute the following for the second complete paragraph on this page:

The proposition that a public nuisance is subject to restraint only at the suit of the Attorney-General has been repeated in Canadian cases: *Turtle v. City of Toronto* (1924), 56 O.L.R. 252; *O'Neil v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649, where Clute J., giving judgment in the Appellate Division, said at p. 647: "The remedy is by indictment or an action at the suit of the Attorney-General . . . 'a member of the public can only maintain an action . . . if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public'", quoting from 16 Halsbury, 1st ed. 1911, s. 269, and referring to *Drake v. Sault Ste. Marie Pulp and Paper Company* (1898), 25 O.A.R. 251 at 256, and *Fritz v. Hobson* (1880), 14 Ch. D. 542.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

1951

[GALE J.]

Re Miles.

Insurance—Life Insurance—Beneficiaries—Designation of Wife—Effect of Subsequent Annulment of Marriage for Impotency—The Insurance Act, R.S.O. 1937, c. 256, s. 161(1).

Section 161(1) of The Insurance Act, which provides that if the wife or husband of an insured, designated in the policy as beneficiary, "is subsequently divorced", her or his interest under the policy shall pass to the insured or his estate, has no application where the marriage between the parties is annulled on the ground of impotency. The word "divorced" must be construed in its normal sense, and in the case of an annulment the designation of the beneficiary remains effective unless and until it is changed by the insured, although the beneficiary will not thereafter be in the preferred class.

Insurance—Life Insurance—Beneficiaries—Right of Ordinary Beneficiary to Sue Insurer—The Insurance Act, R.S.O. 1937, c. 256, s. 153(2), as re-enacted by 1946, c. 42, s. 6.

Since the re-enactment of s. 153(2) of The Insurance Act in 1946 (after the decision in *Deckert v. The Prudential Insurance Company of America*, [1943] O.R. 449) it is clear that an ordinary beneficiary may claim directly against an insurer for the proceeds of the policy.

Insurance—Life Insurance—Change of Beneficiary—"Declaration" by Insured—Insufficiency of Oral Declaration—The Insurance Act, R.S.O. 1937, c. 256, ss. 128(7), 153(1).

Whatever may be the law in other jurisdictions, it is clear that in Ontario an insured cannot change the beneficiary under his policy by any oral declaration. This is the necessary result of reading s. 153(1) of The Insurance Act with the definition of "declaration" in s. 128(7).

AN APPLICATION for payment out of moneys paid into court under s. 179 of The Insurance Act, R.S.O. 1937, c. 256.

11th December 1950. The application was heard by GALE J. in chambers at London.

E. S. Livermore, K.C., for Dorothy Elizabeth Steffler, applicant.

M. Lerner and M. A. Bitz, for Elizabeth Bell Miles, *contra*.

11th December 1950. GALE J. (orally):—With considerable regret I have come to the conclusion that Mrs. Steffler should

receive the money presently standing in court to the credit of this matter.

The late Ross A. Miles was married to the applicant Dorothy Elizabeth Steffler on the 12th December 1936. On or about the 17th June 1937 the deceased effected insurance on his life with the London Life Insurance Company in the amount of \$1,125 under policy no. 305573N and the applicant was designated as beneficiary in the policy in the following words, "The Beneficiary Dorothy E. Miles, Wife of the Insured". On the 28th January 1944 the applicant obtained from this Court a decree for the annulment of her marriage with the insured on the ground of his impotency. Subsequently, on the 15th February 1945, the insured was remarried to the respondent Elizabeth Bell Miles. On 27th August 1948 the applicant was remarried to one Steffler.

The insured died on the 7th December 1945, and upon claims being made by both of the persons to whom he had been married the insurance company paid the proceeds of the policy into court pursuant to the order of my brother King dated the 6th May 1950.

I now have to decide which of the two ladies is entitled to the moneys, and as mentioned at the outset, I have come to the conclusion they should go to Mrs. Steffler as an ordinary beneficiary because of her designation in the policy.

Mr. Lerner argues, with much force, that s. 161 of The Insurance Act, R.S.O. 1937, c. 256,* deprives Mrs. Steffler of the benefits which she would otherwise enjoy under the contract, basing his argument upon the theory that where the word "divorce" or the words "the divorce" or the word "divorced" occur in that section they include a decree annulling the marriage. His argument is based upon the suggestion that the word "divorce", where it is used in the statute, includes not only the type of action strictly known as a divorce, but also an action to declare a voidable marriage invalid. I take it he concedes that the section does not cover the situation where a marriage is declared to have been void from the outset through want of form or illegality.

*"161(1). Where the wife or husband of the person whose life is insured is designated as beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy shall pass to the insured or his estate, unless such beneficiary is a beneficiary for value, or an assignee for value."

His contention really amounts to this, that the word "divorce" involves dissolution and that when a Court is declaring invalid a marriage which, up to that time, has been valid, it is, in essence, decreeing a dissolution of the marriage, and that since the Court is really dissolving the marriage the process comes within the word "divorce" as it is used in the section.

There is strength given to that theory by some of the language used in the case of *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29, and in other cases cited by Mr. Lerner; but in my opinion the language used in those decisions must be examined in the light of what was there being decided and I do not regard it as suggesting that for all purposes there is no real distinction between actions for divorce and actions for annulment. It is true that the two types of proceedings have much in common and that many incidents and results of the two cannot be distinguished, but there has grown up, at least in this Province, a well-known and recognizable difference between these two types of actions. Mr. Livermore described one fundamental dissimilarity better than I can when he said, in effect, that in the action in which Mrs. Steffler obtained her decree the Court declared that a marriage, though subsisting up to that time, was invalid, which had the result of rendering the marriage void from the outset; whereas, in an action for divorce, even though the union is dissolved, the marriage is assumed to have subsisted for all purposes until the time of the subsequent dissolution.

The Legislature which passed s. 161 has recognized some distinction between the two proceedings by enacting the provisions of The Matrimonial Causes Act, R.S.O. 1937, c. 208; and certainly the Parliament of Canada has likewise differentiated between the two forms of action in The Divorce Act (Ontario), 1930, c. 14, and The Divorce Jurisdiction Act, 1930, c. 15. The latter deals only with divorce, as distinct from the special Act which precedes it and which gives jurisdiction to the Courts of Ontario to deal with both types of action. Certainly the Rules passed under the provisions of The Matrimonial Causes Act, which have the force of statute, envisage and mark the difference between an action for divorce and an action to render void *ab initio* a voidable marriage.

It is true that this result leads to a rather anomalous situation because s. 161 of The Insurance Act would therefore have

the effect of overriding the designation of a wife who is divorced but would not have the same effect with respect to a person who entered into a voidable marriage, even though the marriage is subsequently declared to be such.

On the other hand, if Mr. Lerner's argument is sound another odd result would obtain because it would then follow that wives who were designated would have their designation set aside if their marriages were dissolved, either by the action of divorce or by a declaration that the marriage was voidable, but would not have the designation disturbed if the marriage was absolutely void for all purposes.

Perhaps s. 161 should be further considered by the Legislature. It may very well be, however, that the Legislature has, in its wisdom, decided to confine the effect of the section to an action for divorce as that word is used in the normal sense.

Mr. Lerner also contended that the type of action taken by Mrs. Steffler comes within the word "divorce" as it occurs in s. 161 because of the use of the same word in head 26 of s. 91 of The British North America Act. That Act gives to the Dominion of Canada exclusive jurisdiction under that head in the subject matter of "Marriage and Divorce". It occurs to me, however, that perhaps the type of action taken by this applicant, and which was passed on to the Courts of Ontario under The Divorce Act (Ontario), 1930, comes within the subject matter of marriage, rather than divorce. I do not think that argument is conclusive either way.

There were other grounds upon which Mr. Lerner based his client's claim. He contended that there had been an oral declaration made by the insured in favour of his second wife, and an American case was cited in support of the proposition that an oral declaration could change the designation made in the policy. Whatever may be the law elsewhere an oral declaration is not sufficient in Ontario in view of the provisions of s. 153(1) of our Act, when read with the definition of the word "declaration" set out in s. 128(7) of the Act.

It was also argued that a separation agreement entered into between Mrs. Steffler and the deceased on the 23rd October 1942 constitutes a declaration in writing to the effect that the former was no longer to be a beneficiary of the policy, and particular reliance is placed upon clause 9 of the agreement. Without hesitation I hold that the agreement in no sense constitutes a declara-

tion within the provisions of ss. 153(1) and 128(7). The agreement contains no express reference to insurance, and it is impossible to see how the document would, by implication, have the effect assigned to it in argument before me.

It was also suggested that because of the views expressed by Mr. Justice Plaxton in *Deckert v. The Prudential Insurance Company of America*, [1943] O.R. 449, 10 I.L.R. 158, 211, [1943] 3 D.L.R. 747, Mrs. Steffler could not claim the moneys. It seems to me that there are two simple answers to that proposition. To begin with, Mrs. Steffler is not claiming the moneys from the insurance company and is not suing the insurance company. The insurance company, having knowledge of the situation, paid the moneys into court and this is simply an application for payment out. Surely the Court is not precluded from making a declaration to the effect that she is entitled to the moneys and acting on that declaration once it is made.

Even though the insurance company is not involved, however, it is argued that it is only the estate or representatives of the insured and not ordinary beneficiaries who may press for and receive payment. Such a limitation would place an almost impossible barrier before Mrs. Steffler since the representative of the estate, the other contending party, has shown no inclination whatever to make application on behalf of the ordinary beneficiary, Mrs. Steffler.

Subsection 2 of s. 153* of The Insurance Act, which was re-enacted by 1946, c. 42, s. 6, after the *Deckert* judgment, is a complete answer on this point. It is now quite clear that a claim may be made to the proceeds of the policy by an ordinary beneficiary.

Accordingly, it is my view that Mrs. Steffler is entitled to the proceeds of the policy.

I repeat that I regret the necessity for coming to this conclusion because it would appear from the material that Mrs. Miles has a better moral claim to the moneys. However, I cannot be

*"153(2). Subject to subsection 1, a beneficiary or a trustee appointed pursuant to section 177 may, at the maturity of the contract, enforce for his own benefit or as such trustee the payment of insurance money appointed, appropriated or apportioned to him by the contract or a declaration and in accordance with the terms thereof, but the insurer shall be entitled to set up any defence which it could have set up against the insured or his personal representatives; and payment made to the beneficiary or trustee shall discharge the insurer."

governed by a consideration of that sort and must order that the moneys in court be paid out to Mrs. Steffler.

I have heard from counsel on the question of costs. Normally, one would be inclined to the view that there should be no order as to costs. However, the respondent was served with notice of the proceedings to pay the moneys out of court to Mrs. Steffler and as the point is one upon which there has been no authoritative pronouncement, at least in this Province, I think she was amply justified in resisting payment out. Accordingly, the usual procedure should not be followed, but rather the respondent should be allowed some costs out of the moneys in court. In my discretion I am going to fix those costs at \$50.

My order is that there be paid to the respondent out of the moneys in court the sum of \$50 as her costs, and that the balance of the money be paid to the applicant.

Order accordingly.

Solicitors for the applicant: Ivey & Livermore, London.

Solicitors for the respondent: Lerner & Lerner, London.

[SCHROEDER J.]

[COURT OF APPEAL.]

Rex v. McNamara.

Evidence—Confessions and Admissions—Inapplicability of Rules as to Confessions to Evidence respecting Blood Sample Taken from Accused Suspected of Intoxication—Immateriality of Accused's Consent.

Evidence may be given by the prosecution of an analysis of a sample of blood taken from an accused person in custody, whether or not the accused has consented to the taking of the sample. There is no analogy between the taking of such a sample and the taking of a confession or statement from the accused, and there is consequently no onus on the Crown to prove that the sample was freely and voluntarily given. *Rex v. Ford*, [1948] 1 W.W.R. 404 (see [1948] 1 W.W.R. 656), not agreed with.

AN APPEAL from a conviction, before Schroeder J. and a jury, for manslaughter.

One Stevens died as the result of injuries sustained in a collision between his automobile and one driven by the accused. The accused was taken to a hospital, and within an hour after the accident a sample of his blood was taken by a doctor. Evidence was tendered of an analysis made of this sample. This

evidence was objected to, and the following reasons were delivered orally by the trial judge:

26th September 1950. SCHROEDER J.: — In this case the Crown proffers as evidence the analysis of a blood sample which was taken from the body of the prisoner within an hour of the occurrence of the events which gave rise to the prosecution and which led to the death of Victor Stevens.

The accident occurred at 3 o'clock, or shortly after 3 o'clock, in the afternoon of 11th March. The accused sustained several injuries, including, among others, a laceration of his nose, a laceration on the back of the head, injuries to the left side of his chest, possible rib fractures, and an abrasion to his leg. It is said by Dr. Cockram, who attended him, that the injury to the back of his head required four or five sutures to close; his nose injury also had to be sutured. There was an odour on his breath which was indicative of the fact, according to the doctor, that this man had imbibed some alcoholic beverage, but the doctor could not say if his behaviour was due to the injury to his head, or to the liquor which he had imbibed.

Two police officers suggested to the doctor that he take a sample of blood from this man. He did not say that he would have taken the blood even if this suggestion had not been made to him, but he did say that in other cases he had taken such samples without having had it suggested to him as the proper course to be followed. He was looking after Stevens, who was dying, and he was much more concerned with the treatment which Stevens required. It did not occur to him earlier to take a specimen of the blood because he was so busily occupied with the other patient, whose condition was much worse than that of the prisoner. However, after the officers had suggested to him that he take a sample of the accused's blood, he asked the accused if he might do so, and the accused replied in the affirmative. The blood was put in a test-tube, sealed and given to Officer Skidmore, and handed by him to Dr. Rogers who, I presume, made the analysis which is now proposed to be offered in evidence.

Counsel for the accused argues that there is an analogy between the giving of a blood sample by an accused person and the taking of a statement or declaration from him, and that there is an onus upon the Crown to establish, just as in the case of the taking of a confession, that the giving of the blood sample

was free and voluntary. This analogy was drawn by a Court of first instance in the Province of Alberta, in the case of *Rex v. Ford*, [1948] 1 W.W.R. 404, 90 C.C.C. 230, 5 C.R. 146, [1948] 1 D.L.R. 787 (see [1948] 1 W.W.R. 656, 91 C.C.C. 366, 5 C.R. at 153, [1948] 2 D.L.R. 496). For my part, I confess that I find it difficult to draw that analogy. A person may very well be induced by fear of prejudice or hope of advantage held out by a person in authority to make a statement which is contrary to his interest and, while labouring under such an influence, he may say something detrimental to himself or self-incriminating, which is quite untrue. That I take to be one of the principal reasons supporting the proposition which was established in *Ibrahim v. The King*, [1914] A.C. 599, and like cases; the last important case on the point being *Boudreau v. The King*, [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81. That case departs somewhat from an earlier decision as to the significance of a warning or its absence. Mr. Justice Kerwin in the *Boudreau* case puts the principle in this way: "The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one."

If one were to say that an analogy has to be drawn between the instant case and a case involving the taking of a statement from a man who was labouring under the influence of liquor to such an extent that he was not in control of himself mentally or physically, this question arises, namely, that in the case of a statement or a declaration, it might very well be that the man had reached such a state of irresponsibility that one would not be inclined to regard his statement as free and voluntary or that one would attach so little weight to it that its value as evidence would be negligible. But how can that condition apply to any of the physical characteristics of the accused? Does it make the blood sample taken any less reliable as evidence? Does it in any way affect the quality of his blood except

to give it an alcoholic content? Obviously if the man were not suspected of being under the influence of liquor, there would be no reason for the taking of a sample of his blood.

There are many cases in the authorities where evidence has been obtained even by deception on the part of police officers, and while such conduct was to be deprecated and was deprecated, the evidence was not for that reason disallowed. I do not refer, of course, to cases involving a prisoner's statement or declaration.

I am not prepared to hold in this case that there was anything improper in the actions of the doctor in taking the sample of the prisoner's blood. The doctor asked the prisoner if he might take it and the prisoner assented to his doing so. I am not prepared to assume that the prisoner was in such a state of mind that he could not give a valid consent. I do not believe that there is enough evidence before me to lead me to the conclusion that there is even a reasonable doubt as to his being so bereft of his senses that he could not give a valid consent, but, even if this specimen were taken without his consent and against his will, while such action would be an invasion of this man's private rights, and would in fact constitute a trespass to his person, he would at most have a cause of action against the doctor sounding in tort. I am not prepared to hold that the sample or the analysis of it may not be offered in evidence either for or against the accused. Having regard to the circumstances in which the specimen was taken here, there is no criticism to be levelled at anybody. The police suggested to the doctor that he secure it but there is no evidence that they were present when he took it. The doctor was attending the accused, just as he was attending the victim of this accident. Was he, in any event, a person in authority *quoad* the accused? That point has not been argued, but if the analogy between the taking of a confession and the taking of a blood sample were to be sustained, that question must certainly be determined. I do not think that the doctor is so concerned with the prosecution of this case (even though he did act on the suggestion of the police officers) that he is to be regarded as a person in authority. For the reasons I have mentioned, I have reached the conclusion that the evidence tendered by the Crown ought to be admitted in evidence.

Bring back the jury please.

Evidence admitted.

After the admission of this evidence the trial proceeded, and the accused was convicted.

11th December 1950. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH JJ.A.

G. S. P. Ferguson, for the appellant: The evidence as to the blood test was improperly admitted. This question has not yet been dealt with by any appellate Court in Canada, and in the United States of America there are decisions both ways. My submission is that there is an analogy between the taking of a sample of blood from an accused person and the taking of a confession from him, and that there is the same onus on the Crown to prove that it was freely and voluntarily given: *Rex v. Ford*, [1948] 1 W.W.R. 404, 90 C.C.C. 230, 5 C.R. 146, [1948] 1 D.L.R. 787 (see [1948] 1 W.W.R. 656, 91 C.C.C. 366, 5 C.R. at 153, [1948] 2 D.L.R. 496); *Rex v. Frechette* (1949), 93 C.C.C. 111, affirmed 94 C.C.C. 392; *Rex v. Lingard*, Wells J., 23rd March 1950 (unreported), 1 Chitty's Law Journal, p. 14.

Rex v. Nowell, 32 Cr. App. R. 178, [1948] 1 All E.R. 794, although it appears to be against my submission, is not an authority, because it is apparently an established rule in England that when a person is detained and alcohol may enter into the case a doctor must be called. Also, the accused in that case was given an opportunity to have his own doctor present.

The doctor here was clearly a person in authority, because he took the blood sample at the suggestion of the police, and acted as their agent in doing so: *Rex v. Roadhouse*, 48 B.C.R. 10, 61 C.C.C. 191, [1934] 1 W.W.R. 349. Further, according to his evidence the accused was very confused, and therefore in no condition to give a valid consent.

Evidence of a blood test is not conclusive: *Earnshaw v. Dominion of Canada General Insurance Company*, [1943] O.R. 385, 80 C.C.C. 35 at 44, [1943] 3 D.L.R. 163, 10 I.L.R. 143.

If such evidence is to be admitted against the accused he should be given an opportunity to have the sample analyzed by someone on his behalf, who can be called as a witness. As admitted by Professor Rogers in this case, there exists a decided difference of opinion as to the effect and value of such a test.

Some things (*e.g.*, photographing, fingerprinting, etc.) are expressly authorized by The Identification of Criminals Act, R.S.C. 1927, c. 38. If a blood test is to be permissible, there should be a specific statutory provision, safeguarding the rights of accused persons.

[Counsel also argued that there had been misdirection, but the argument is not noted on those points.]

W. B. Common, K.C., for the Attorney-General, respondent: There is no analogy between the taking of a sample of blood and the taking of a confession. The sole reason for the special rules as to confessions is to guarantee the truth of the statements, because of the danger of a false statement following a threat or inducement. This can have no application to a matter wholly objective in its nature, which cannot possibly be affected by any promise or threat. I rely on *Rex v. Nowell*, *supra*.

The rule against self-incrimination (relied on in *Rex v. Frechette*, *supra*) has never gone as far here as in the United States. This taking of a blood sample is an incident of arrest, like removing an accused's clothing to examine it for bloodstains, taking hair from his head, or searching persons under arrest and taking anything that may afford evidence for the prosecution: *Rex v. Brezack*, [1949] O.R. 888, 96 C.C.C. 97, 9 C.R. 73, [1950] 2 D.L.R. 265.

I concede that the blood test is not conclusive, and the trial judge did not say in his charge that it was.

G. S. P. Ferguson, in reply.

Cur. adv. vult.

12th December 1950. The judgment of the Court was delivered by.

ROBERTSON C.J.O. (orally): We are of the opinion that the appeal fails as to both conviction and sentence. We think there was no misdirection by the trial judge. We think that the theory of the defence was adequately explained to the jury. We think there was no improper admission of evidence.

Referring particularly to the special matter of the use in evidence of the sample of the blood of the accused taken, as he contends, without his consent, we are of opinion that the ruling of the trial judge is right. It was not taken without his consent, his consent was given. We are further of the view that even if the fact established were that the sample of blood

was taken without his consent that would not prevent the use of the sample as evidence at the trial.

We do not think there is any analogy between the taking of a sample of the blood without the consent of the accused and the taking of a statement not made by the accused voluntarily.

For these reasons we dismiss the appeal against the conviction and we see no grounds for interfering with the sentence.

Appeal dismissed.

Solicitor for the accused, appellant: George S. P. Ferguson, Toronto.

[COURT OF APPEAL.]

Rex v. Leland.

Criminal Law—Joint Trial of Two Accused—Acquittal of One Accused Directed—Unfairness in Trial of Remaining Accused—Wrong Interpretation of Evidence by Trial Judge—Impossibility of Ordering New Trial.

The appellant and her husband were jointly charged with manslaughter, arising out of the stabbing of one M. On the evening in question a quarrel occurred between M and the appellant's husband (who, with the appellant, lived as a roomer in M's house), and they began to fight in a bathroom. The fight continued during a period when all the lights in the house were turned off. Very soon after the lights had been turned on again M was heard calling to his wife, "She stabbed me". He died in a few minutes. Not long after the stabbing occurred the appellant was heard to say in her room, "What shall I do now?"

At the close of the case for the prosecution a motion was made for a directed verdict. The trial judge granted this motion in the case of the husband, but refused it as to the appellant, who was convicted.

Held, the conviction must be set aside. The circumstantial evidence pointed to the husband's guilt as much as to that of the appellant, but the trial judge based his decision to discharge the husband largely upon the words spoken by M, which he deemed inconsistent with the husband's guilt. Assuming that evidence of these words was properly admitted (as to which see *infra*), the trial judge had throughout treated them as a declaration that it was the appellant who stabbed M, and the ambiguity of the statement, and the possibility that M, if he was stabbed in the dark, might not have known who stabbed him, were not drawn to the jury's attention, nor were other matters that, in the opinion of the Court, were proper for the jury's consideration. The appellant's remark after the stabbing was treated by the trial judge in his charge as a "circumstance" (*i.e.*, circumstantial evidence), but this was improper, since there was no evidence to connect the question with the stabbing of M. The trial was unfair in various respects and the trial judge, in directing the acquittal of the husband, had himself decided questions of fact that should have been left to the jury.

Held, further, there should be no order for a new trial, but an acquittal should be directed, since it would be impossible to secure a fair trial of the appellant. If the trial were to proceed upon the same indictment it would be impossible to keep the jury from knowing that the

husband had been acquitted, and it would be difficult to put the position before the jury in such a way as to assure that they would consider the case, so far as the appellant was concerned, as if it were still an open question whether the husband did not stab M.

Evidence — Circumstantial Evidence — Proper Direction to Jury — Evidence only partly Circumstantial.

The rule in *Hodge's Case* (1838), 2 Lew. C.C. 227, is a proper instruction to the jury only in a case where the evidence is wholly circumstantial; it is not a direction that can be applied in a case where there is also material direct evidence that the jury accepts. *Rex v. Deacon* (1947), 87 C.C.C. 271 at 324 (reversed on other grounds, 89 C.C.C. 1); *Rex v. Sears*, [1948] O.R. 9; *McLean v. The King*, [1933] S.C.R. 688, referred to.

Evidence—Exceptions to Hearsay Rule—Statements Forming Parts of res gestae—"Spontaneous exclamations"—Use as Evidence.

Our rules of evidence do not recognize as one of the exceptions to the hearsay rule the class of statements dealt with in Wigmore on Evidence, 3rd ed. 1940, ss. 1746-7, under the heading of "Spontaneous Exclamations (Res Gestae)", as forming an exception to the hearsay rule. Further, although the English authorities (e.g., Phipson on Evidence, 8th ed., p. 61) discuss at some length the general rules as to the admissibility of evidence of declarations properly forming part of the *res gestae*, they also point out that such declarations are neither proof of the facts they accompany nor evidence of the matters stated in them. *Amys v. Barton*, [1911] W.N. 205; *Wright v. Kerrigan*, [1911] 2 I.R. 301; *Gilbert v. The King* (1907), 38 S.C.R. 284, discussed. Evidence of M's declaration was therefore not admissible as evidence of the truth of the fact stated by him, and it was doubtful if the statement formed part of the *res gestae*, since the fighting had ceased and no one was pursuing M or seeking to continue the struggle.

AN APPEAL from a conviction for manslaughter, before McRuer C.J.H.C. and a jury.

25th and 26th September 1950. The appeal was heard by ROBERTSON C.J.O. and AYLESWORTH and MACKAY JJ.A.

Howard A. Phillips, for the appellant: 1. Evidence of Monteith's statement, "Rose, she stabbed me", should not have been admitted. The trial judge's charge shows that he admitted it as part of the *res gestae*, and not as a dying declaration, and indeed there is no evidence that Monteith was then dying or conscious of impending death. The basis for the admissibility of such statements, as stated by the trial judge, is that they are trustworthy because the maker has not had time to reflect. That, however, is not the case here. There was no evidence of the time of the stabbing, but it would appear that there might have been an interval of at least 5 minutes between it and his shout. Mrs. Robertson thought nothing of the statement when she heard it, and this was because she had heard Monteith make many exaggerated statements and considered him untrustworthy.

It is well established that for a statement to be admissible as part of the *res gestae* it must be substantially contemporaneous.

aneous with the event. The leading case is *Reg. v. Beddingfield* (1879), 19 Cox C.C. 341. I refer also to Wigmore on Evidence, 3rd ed. 1940, s. 1756; *Rex v. Foster* (1834), 6 C. & P. 325, 172 E.R. 1261; *Rex v. Christie*, [1914] A.C. 545 at 556-7; *Reg. v. McMahon et al.* (1889), 18 O.R. 502 at 515-8; *Reg. v. Goddard* (1882), 15 Cox C.C. 7.

The statement was clearly not admissible as a dying declaration, and no attempt was made to lay a foundation for its admission on that ground. As to dying declarations, I refer to *Reg. v. Jenkins* (1869), 11 Cox C.C. 250; Cockle's Cases and Statutes on Evidence, 5th ed. 1932, pp. 235-40; *Reg. v. Smith* (1873), 23 U.C.C.P. 312; *Schwartzenhauer v. The King*, [1935] S.C.R. 367, 64 C.C.C. 1, [1935] 3 D.L.R. 711.

If the statement was not properly admissible in evidence, there was no evidence to go to the jury against this appellant, just as there was no evidence to go to them against the husband.

2. The trial judge, in his charge to the jury, over-emphasized the evidence of Murray Robertson, aged 11. He should rather have cautioned the jury to subject this evidence to very careful scrutiny: 9 Halsbury, 2nd ed. 1933, p. 220. He should also have drawn their attention to the discrepancies between this evidence and that of the other witnesses. He was inaccurate in some respects in summarizing the boy's evidence.

3. One of our suggestions to the jury was that Mrs. Monteith might have been the person who stabbed her husband. This was not adequately put to the jury by the trial judge, who referred to it as a "fanciful theory", and did not mention evidence that might have been considered as bearing it out.

4. The words "What shall I do now?" were emphasized by the trial judge apart from their context, and without any explanation of what they meant or might mean: *Rex v. Christie*, *supra*, at p. 559.

W. B. Common, K.C., for the Attorney-General, respondent:
1. Monteith's statement was properly admitted as part of the *res gestae*: *Gilbert v. The King* (1907), 38 S.C.R. 284, 12 C.C.C. 127; *Rex v. Foster* (1834), 6 C. & P. 324, 172 E.R. 1261. [ROBERTSON C.J.O.: There had been nothing going on between this appellant and Monteith; the fight had been with the husband. How can this statement be a "continuation" of what had been happening?] My position is that it was a "three-cornered" fight. I concede that I cannot support this evidence as a dying declara-

tion, but it is also supportable on the second ground in *Gilbert v. The King*, *supra*, in that it was a remark made in the presence of the appellant and in such circumstances that it called for some reply or comment. [AYLESWORTH J.A.: That might be so if the remark had been "Mrs. Leland stabbed me". But he only said "she", and how did that call for a reply from any particular person?]

There was evidence to go to the jury quite apart from this statement—the finding of the knife, the furtive approach to the scene of the fight, the remark "What shall I do now?", etc.

2. The trial judge's observations on the boy and his evidence cannot be criticized in this court. Further, he did not place undue emphasis on the evidence. The inconsistencies and contradictions were immaterial. The trial judge's charge must not be subjected to a microscopic scrutiny. In any event, the circumstantial evidence in the case could point only to the guilt of the appellant, quite apart from the factual evidence of the Robertson boy.

3. This defence was quite adequately put to the jury. The charge as to circumstantial evidence is in the very words of *Hodge's Case* (1838), 2 Lew. C.C. 227, 168 E.R. 1136. The evidence is not consistent with the stabbing having been done by Mrs. Monteith.

4. This remark by the appellant was merely one more piece of circumstantial evidence, properly admitted.

5. Even if some of the objections taken by appellant are well-founded, this appeal should be dismissed under s. 1014(2) of The Criminal Code, R.S.C. 1927, c. 36, on the ground that there has been no substantial wrong or miscarriage of justice.

Howard A. Phillips, in reply: *Gilbert v. The King*, *supra*, is distinguishable from this case, because there the accused was pursuing the deceased, which was the basis relied upon in the judgment for distinguishing *Reg. v. Bedingfield*, *supra*.

Cur. adv. vult.

18th December 1950. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by Rae Leland from her conviction on the 18th April 1950, upon her trial before McRuer C.J.H.C., with a jury, at Toronto, on a charge of man-

slaughter. Appellant also appeals from the sentence of 12 years' imprisonment imposed, but the hearing of that appeal stands until judgment is given on the appeal from conviction.

The indictment charged that appellant and her husband, Keith Leland, did slay and kill one Thomas Monteith on or about the 30th December 1949, at Toronto, and did thereby commit the indictable offence of manslaughter. Both husband and wife pleaded not guilty, and they were tried together, and were represented by the same counsel. At the close of the case for the Crown, counsel for the defence moved for the discharge of both accused, and argued that the Crown had made no case against either of them. This motion was granted in the case of the husband, counsel for the Crown agreeing. On the direction of the learned Chief Justice the jury returned, in the case against him, a verdict of not guilty, and he was discharged. The motion was dismissed in so far as the appellant was concerned. No evidence was called for the defence and the jury returned a verdict of guilty against her.

Thomas Monteith, 43 years of age, lived at 77 River Street, in the city of Toronto. He occupied the rooms on the ground floor of the house, with his wife and two children. Keith Leland and his wife, the appellant, occupied, as Monteith's tenants, two rooms on the floor next above the ground floor. They had a child about five years of age. A Mrs. Robertson occupied—also as Monteith's tenant—the back room on the same floor, with her two boys, aged 9 and 11 years. There was also a bathroom, but no other room, on this floor. The top floor was occupied by Mr. and Mrs. James and their two small children. There were, all told, fourteen persons regularly occupying this comparatively small house, and on the evening of 30th December 1949 all the usual occupants were at home, with the exception of Mr. and Mrs. James, who had gone out for a while, and had asked Mrs. Robertson to keep an eye on their two small children.

There was considerable drinking that evening on the part of Mr. and Mrs. Monteith, and on the part of Mr. and Mrs. Leland, in their respective apartments. There is evidence of both Mrs. Robertson and the police, who were called on the death of Monteith, that Mrs. Monteith was intoxicated. There is evidence that, on other occasions, there had been drinking and fighting on the premises, and that on several occasions the police had been called in to restore order. There is no evidence that Mrs.

Robertson or Mr. and Mrs. James participated in the slightest degree in any of these affairs. Mrs. Robertson, who was an important witness at the trial, is plainly a woman of character and intelligence and much concerned to keep her two boys from contact with these occurrences.

The Lelands had had some visitors in the early part of the evening of 30th December, but the only one of them who remained throughout the evening, and was still there when the police arrived, was one John Gerula, a foreigner who gave his evidence through an interpreter.

For some time in the early part of the evening there had been a quarrel going on between Mr. and Mrs. Leland, which disturbed other occupants of the house. It was over a \$2 bill. This disturbance finally brought Monteith part way up the stairs to demand less noise. Leland came out to the upstairs hall and advised Monteith to go back downstairs where he belonged. Soon they were engaged in loud verbal exchanges and threats, swearing at each other. Then Monteith came the rest of the way upstairs and Leland moved along the hall nearer to the head of the stairs, each declaring to the other that he was not afraid of him. Then Monteith stepped into the bathroom, the door to which was just across the hall from the head of the stairs, and Leland followed him and they began wrestling and pushing each other about in the bathroom, making a good deal of noise. Mrs. Robertson's room at the back of the house immediately adjoins the bathroom. When this fighting started between the two men she was in her room with her two boys and the two Monteith children. Fearing that the James children might be alarmed by the noise and come downstairs, Mrs. Robertson opened the door of her room to go up to them, first telling her own and the Monteith children to lock the door of her room and remain there. Her way along the hall to the foot of the stairs leading to the third storey was obstructed by the two men at the moment, and she remained at her door until they had crossed the hall and were in the bathroom. She then proceeded on her way along the hall towards the front of the house and up the stairs to the top storey. She had got only part way up the stairs when the lights went out. She continued upstairs to the James children and remained with them until the lights came on again. Mrs. Monteith says that she turned the switch in the basement off to stop the men fighting and that she had the lights off only

for the time it took to turn the switch off and then to turn it on again. Mrs. Robertson, however, estimated the time the lights were off at nearer five minutes. She was certain that the time was more than a minute or two.

While the house was in darkness the fighting in the bathroom continued, but soon after the lights came on again Monteith was heard to call from the head of the stairs, "Rose, she stabbed me", or, according to some witnesses, "Rose, she stabbed me through the heart."

"Rose" is Mrs. Monteith's name. She says she had just come up from the basement after turning the lights on again, when she heard Monteith call. Mrs. Monteith says he called her only once, but others say that he called more than once, repeating the same words. She remained where she was and Monteith walked on down the stairs and along the hall towards her, when he collapsed. He had left pools of blood along his way from the bathroom. In a few minutes he was dead.

There is no direct evidence that appellant was in the bathroom at any time while the fight was in progress, or while the lights were off, or afterwards. No witness either saw or heard her there. Appellant's husband was the only person seen or heard in the bathroom with Monteith. Beyond question he was there. The only witnesses who testified to having seen appellant anywhere while the fight was in progress, or immediately after, are Murray Robertson—Mrs. Robertson's 11-year-old boy—and John Gerula, the Lelands' visitor. The evidence of the latter, owing apparently to his own stupidity or to that of the interpreter, is so confused and self-contradictory that the Chief Justice cautioned the jury against making a decision one way or the other on his evidence.

The evidence of Murray Robertson must be given more serious consideration. He was, throughout, in the back room upstairs, and with him were his younger brother and the two children of the Monteiths. He mentions only the elder one, Margot, but both Margot and Mrs. Robertson say the younger Monteith child was also there. On the occasion I have already referred to when the trouble between the two men was developing out in the upstairs hall and Mrs. Robertson, anxious for the James children, had closed the door of her own room to go up to them, telling the children in her room to lock the door and stay in there, she had only got part way upstairs when the lights went off. Murray

Robertson says that as his mother had forbidden him to open the door he climbed upon a radio standing in their room close to the door and from there he could see through the transom over the door, into the hall. He says that he saw the two men wrestling and going into the bathroom. Then he says he saw appellant come out of the Lelands' front room and proceed slowly along the hall, walking sidewise, with her back to the wall. Proceeding in this way she got only to a point some two feet short of the door leading into the Lelands' bedroom when the lights went out and he saw nothing more of her. He says that she had her hands in front of her as she came along the hall, and had nothing in them.

There are some observations to be made about the evidence of this witness. Margot, the 14-year old daughter of the Monteiths, who was in the room with the Robertson boys, says that Murray Robertson was in the room with her and the door was closed and he could not see, and that he was not standing on the radio. When Murray Robertson was asked how long he was looking through the transom from the top of the radio, he said: "About twenty minutes." This is not at all in agreement with Mrs. Robertson's story. After closing the door of her room she had to wait until the men had crossed the hall, and then to walk a few steps to the stairs and part way upstairs, when the lights went off. This could have taken only a minute or two.

Even if the evidence of Murray Robertson is accepted, it may lose some of its significance as an indication of secretiveness on appellant's part from the fact that later, while the lights were still off and the fighting was continuing, Mrs. Robertson, while sitting with the James children, says that she could hear appellant and Monteith shouting to each other. By her voice, Mrs. Leland appeared to the witness to be in the hall. The voices did not sound as if the two were together, but as if they were in different parts of the house. Mrs. Monteith gave somewhat similar evidence. There is no evidence that appellant was in the bathroom at any time.

The police responded promptly to the call put in by Mrs. Robertson after Monteith's death, and they made an examination or search of the premises. They found Monteith dead, Mrs. Monteith intoxicated, and the Lelands, husband and wife, apparently sober. They examined the marks of blood on the bathroom and hall floors and on the stairs. They found a knife in the Lelands'

room on a table under an electric plate, which somewhat concealed it. It was what is commonly known as a paring-knife, and at the point where the handle joined the blade there were marks that, on a later examination by an expert, were discovered to be human blood. A doctor's opinion was given in evidence to the effect that such a knife as this could have produced a wound such as was inflicted upon the deceased Monteith. There is no evidence as to the ownership or prior use or whereabouts of this knife.

Another matter that appears in evidence, and that was relied upon by the prosecution, is that after Monteith had gone downstairs and Mrs. Robertson had sent all the children upstairs to the James's apartment, the appellant, in her own room with the door shut, was heard to say, "What will I do now?" There is no evidence as to what she was talking about or to whom she was speaking, nor is there evidence of an answer to her question.

I have set forth the evidence in some detail so that it may be seen to what extent it is circumstantial, and to what extent the circumstantial evidence, by itself, makes out a case against the appellant. It is essential also to the proper understanding of some of the objections taken on the appeal to the charge of the Chief Justice to the jury.

On the conclusion of the evidence counsel for the defence, as already stated, moved for the discharge of both accused, and his motion was granted in the case of the husband and refused in the case of the wife, who now appeals. In making this distinction the learned Chief Justice obviously made some decisions upon the facts to be determined that in the ordinary course would be for the jury to make. Possibly the most important of these questions of fact was in relation to the hearsay evidence of the words spoken by the deceased Monteith after the fighting in the bathroom had ended. In the course of the argument of the motion the Chief Justice said to counsel for the defence: "There is a strong argument in favour of the male accused, that there is no evidence except what you brought out in cross-examination of one of the witnesses that he was fighting with the deceased, and that was rather emphasized, but it is quite inconsistent with the declaration of the deceased that it was the female accused that stabbed him" This statement does not accurately state the respective positions of the two accused. There was against the male accused more evidence

than evidence "brought out on cross-examination of one of the witnesses that he was fighting with the deceased". The struggle between the two men in the bathroom was introduced first by counsel for the Crown in his opening address to the jury, and was gone into by him on the examination-in-chief of Mrs. Monteith, Mrs. Robertson, Margot Monteith and Murray Robertson. The fighting was the occasion of Mrs. Monteith's shutting off the lights; it was the occasion for Mrs. Robertson's running up and down the stairs to the third storey to keep the children away from the fighting; it was what excited the interest of Murray Robertson from first to last. The evidence is that the fighting continued notwithstanding that the lights were off, and almost to the time when Monteith called to his wife that he was stabbed. There is no evidence that Leland left the bathroom until after the stabbing. On the other hand, there is no evidence that anyone was in the bathroom with Monteith but Leland. The fighting between the two men was not a mere incident introduced by the defence to distract attention from evidence against the appellant. Then, not only was Leland involved in a fight with Monteith, but the same inferences could be drawn against him as against the appellant from the finding of the knife in their front room.

Of greater importance for the present purpose is the statement of the Chief Justice in the extract I have quoted, with respect to the declaration of the deceased, Monteith. The Chief Justice describes it as "the declaration of the deceased that it was the female accused that stabbed him". It was of great importance to the defence of the appellant that the evidence in regard to that declaration should not be prejudged, but should be left for the consideration of the jury. There were matters for the jury's determination, some of considerable importance and some of less, but all within the function of the jury rather than that of the trial judge, except the question of the admissibility of the statement in evidence. That question was not raised at the trial, but I shall have something to say later about it. In the meanwhile I shall treat the evidence as admissible, both as evidence of the fact that a declaration was made, and as evidence of the truth of what was said.

As already appears the evidence is not precise as to whether the stabbing occurred while the lights were still off or after

the lights came on again. The evidence is merely that the fighting in the bathroom continued, as indicated by the noises, and Mrs. Monteith says she turned the lights on again because turning them off had not stopped the fighting. Monteith's call gave the earliest knowledge any of the witnesses had of the stabbing and that, according to Mrs. Robertson, seemed "a very short while" after the lights went on again. At another place in her evidence, when asked, "How long was that [Monteith's call] after the lights came on?" she said, "It happened very shortly after." It is of great importance to know what opportunity Monteith had to see and identify his assailant. Unless the jury had substantial ground for assurance on that matter, they could hardly proceed far upon that evidence without a reasonable doubt.

Then, the witnesses disagree as to what Monteith's statement was. Mrs. Monteith and her daughter Margot say the words, were, "Rose, she stabbed me." Mrs. Robertson and her son Murray say the words were, "Rose, she stabbed me through the heart." Now, these four persons were not all in the same place. Mrs. Robertson was up in the third storey with a door at the foot of the stairs. Mrs. Monteith had just come up from the cellar, or was on the way up. The Monteith girl and the Robertson boy were in the back room adjoining the bathroom. Yet the girl and the boy, having apparently equal opportunity to hear, disagree as to what was said. Each of them agrees with his or her mother. A further difference is in this, that Mrs. Monteith is emphatic in stating that Monteith called only once. Mrs. Robertson says he repeated the call "about three times in a lower voice". The circumstance that the two children, both hearing from the same room, should disagree as to what was said, and each agree with the version of his or her mother, suggests that subsequent "talking it over" in the family circle may have had something to do with their recollection. In any event there is this rather substantial difference as to what was said, and it suggests the possibility that all these witnesses may be mistaken as to the word "she".

This is one of the dangers inherent in the admission of hearsay evidence, even when it is properly admitted. There is no possibility of cross-examining the original speaker to examine further into the matter and to remove doubt. Inaccuracy in hearing, failure of memory, and the effect of talking it over afterwards are all dangers to be apprehended.

There is further, the ambiguity of the word "she", when there is nothing said to identify the person spoken of as "she". It is very easy, of course, to say, "Who else could it be but Mrs. Leland?" But there were other women about. One of them, Mrs. Monteith, was intoxicated and much concerned about the fighting, and it was dark and it was she who made it so. She may have made a mistake in her man, intending to wound Leland. All the evidence as to her movements does not coincide with her own. These and other things were suggested in argument before us as possibilities in the circumstances. In so disorderly a house much may happen that is unexpected, and in a trial for homicide, a juryman may reasonably have doubts where there is confusion, and if the lights were off Monteith would not know whether it was a woman or a man who stabbed him.

What is made of all this for the defence is that the learned Chief Justice acted on his own opinion upon important questions of fact, when he directed the jury to find a verdict of not guilty in the case of the husband. It is true that the Chief Justice did not state to the jury, in directing a verdict of not guilty in the case of the husband, that he had made these or any findings of fact as incident to his direction, but the charge to the jury on appellant's case was, with all respect to the learned Chief Justice, strongly flavoured with the opinions in regard to the facts that he had acted upon in discharging the husband.

After the Chief Justice had reviewed the evidence in charging the jury, he proceeded to instruct them as to some matters of law. I quote as follows:

"There are two things I want to instruct you on with reference to the law. The first is as to circumstantial evidence—and the evidence here is circumstantial with the exception of the statement made by the deceased, 'Rose, she stabbed me', or 'stabbed me through the heart'—and the application that you will make of that statement, the use you will make of it in relation to the other facts.

"Where the circumstances are consistent with the guilt of the accused and inconsistent with any other rational conclusion, you may convict the accused; but if they are consistent with any other rational conclusion you must acquit.

"In the first place, you will have to decide whether these circumstances as related—that is, the evidence of the finding of the knife in the room to which the accused woman had

gone, if she was out of that room as the little boy says, the knife having human blood on it, the place where it was found, a rather unusual place for a paring-knife, and there only being two people in contact with the deceased at the time, the deceased having been stabbed and the stab-wound relating to the nature of the wound that a knife of this sort would make.

“Those are circumstances. It is for you to decide, are they consistent with the guilt of the accused? Then decide, are they consistent with any other rational conclusion? There is no suggestion put forward that it was Mr. Leland that stabbed the deceased, that is not argued by counsel, but you will give it the consideration that you think it deserves. If you think the whole evidence is consistent with Mr. Leland having done it, you should acquit the accused woman, but you will take in relation to the circumstances the statement made by the deceased, ‘Rose, she stabbed me.’ ”

The Chief Justice is here giving an instruction to the jury such as, in so far as it relates to circumstantial evidence, is proper to be given only in a case where there is no other evidence than circumstantial evidence: *Hodge's Case* (1838), 2 Lew. C.C. 227, 168 E.R. 1136. It is not a direction that can be applied in a case where there is also material direct evidence that the jury accepts: see *Rex v. Deacon*, 55 Man. R. 1, 87 C.C.C. 271, 3 C.R. 129, [1947] 1 W.W.R. 545 (reversed on other grounds, 89 C.C.C. 1, 3 C.R. 265, [1947] 3 D.L.R. 772); *Rex v. Sears*, [1948] O.R. 9, 90 C.C.C. 159, 5 C.R. 1; *McLean v. The King*, [1933] S.C.R. 688, 61 C.C.C. 9, [1934] 2 D.L.R. 440. The circumstantial evidence here was as consistent with the guilt of the husband as with the guilt of the wife. It is the direct evidence—that is, the evidence of the declaration of Monteith as to who stabbed him—that was mainly relied upon by the Chief Justice in directing a verdict of not guilty in the case of the husband. He considered that declaration to be inconsistent with, or at least to prevail over, any circumstantial evidence that might point to guilt of the husband. He did not apply the formula laid down in *Hodge's Case* in deciding that the husband should be discharged.

The direction of the Chief Justice, in the extract I have quoted from his charge that the jury “will take in relation to the circumstances the statement made by the deceased, ‘Rose, she stabbed me’ ”, is in definite and unqualified terms and it is given as part of

an instruction "with reference to the law" which the jury must follow. It is a direction that removed from the consideration of the jury any questions raised by the defence in respect of the words spoken by the deceased, and their meaning.

In the course of his review of the evidence when charging the jury, the Chief Justice had this to say, in reviewing the evidence of the girl Margot Monteith:

"She saw blood in front of the bathroom, heard her father go downstairs and heard him fall. Then she heard Mrs. Leland say, 'What will I do now?' Well, that is just one phrase detached from all others, but it raises something, gentlemen, for consideration as to what was on her mind when she said, 'What will I do now?' It is a circumstance, and I am going to discuss circumstances with you later on."

When Mrs. Leland spoke the words, "What will I do now?" she was in their room. There is no evidence as to whom, in particular, she addressed the question to, and no evidence of any answer. In the circumstances all that could be usefully said to the jury was to tell them to ignore the remark. Unless it were first assumed that the appellant was guilty, the remark could be given no significance as bearing upon the stabbing that had occurred. With respect, I think it was improper for the learned Chief Justice to say to the jury that it was a circumstance and that he was going to discuss circumstances with them later on. This was plainly a direction to the jury that they might consider this question of the appellant as having relation to the crime.

I shall not go over in detail the several objections to the charge taken by counsel for the appellant on the argument of the appeal. Some of these matters have already been referred to. In my opinion, not only was the trial unfair in the respects I have mentioned, but in his charge to the jury the case for the defence was not, in my opinion, put fully and fairly before the jury by the learned Chief Justice. On these grounds the appeal must be allowed and the verdict of guilty must be set aside.

The question whether a new trial should be directed has given me some concern, for the discharge of the husband on this indictment has put the appellant in a more difficult position, and in a position not entirely fair to her. On a new trial of the appellant on this indictment it would be impossible to keep

from the jury knowledge of the fact that the husband had been tried on this indictment and had been discharged, and it would be difficult to put the position before the jury in a manner that would assure that the jury would consider the case, so far as the appellant is concerned, as if it were still an open question whether the husband did not stab Monteith. In my opinion it would be impossible to assure a fair trial of the appellant if a new trial were directed, and I would, therefore, direct a judgment and verdict of acquittal to be entered.

In what I have already written I have assumed that the evidence of the several witnesses as to the declaration attributed to Monteith after he had been stabbed was admissible as evidence of the truth of the fact stated by him. After making a study of the authorities bearing upon the question, I am of the opinion that the declaration was not admissible as evidence of the truth of the fact stated. The evidence is, of course, "hearsay", and the general rule is that hearsay is not evidence. There are, however, certain well-established exceptions to this rule. Phipson on Evidence, 8th ed. 1942, at p. 207 has this to say under the heading "Principle of the Exclusion of Hearsay": "No single principle can be assigned as having operated to exclude hearsay generally, or from any ascertainable date. For several centuries both admission and exclusion flourished incongruously side by side, juries being allowed to act upon hearsay as part of their local 'knowledge', while witnesses were debarred from repeating it because it was not 'testimony'." There is much to be found of interest and instruction in Phipson's chapter on hearsay, beginning at p. 205, that cannot be quoted within the reasonable compass of this judgment, but yet is of value in forming an opinion upon the question of admissibility arising here.

No objection was taken at the trial to the admissibility of this hearsay evidence, or to its use as evidence of the fact stated. There was, therefore, no ruling as to admissibility, before the evidence was given. It was not until his charge to the jury that the learned Chief Justice stated the ground upon which he deemed the evidence to be properly admitted. Immediately following that part of the charge that I have already quoted, where the Chief Justice told the jury that they "will take in relation to the circumstances the statement made

by the deceased, 'Rose, she stabbed me'", the learned Chief Justice proceeded as follows:

"Now, the admission of this evidence is a little unusual because it is in a statement made not under oath, but in the circumstances of this case I charge you as a matter of law that it is evidence for you to consider.

"It is based on the experience that under certain external circumstances of physical shock a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the shock. Since this utterance is made under the immediate and uncontrolled domination of the sense—that is, the sense that the man is stabbed—and his first shout after the stabbing, and during the brief period when considerations of self-interest could not have been felt to appear by recent reflection, the utterance may be taken as particularly trustworthy or at least as lacking the usual grounds of untrustworthiness, that is, of statements made when there is time for reflection, and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him, and may therefore be received in testimony as to those facts.

"When I give that to you, I am giving it in the precise language of a very high authority. So you take the exclamation immediately after the event, before there is time for reflection, and give it the weight related to all the other circumstances that I have indicated to you."

The reference of the Chief Justice to "a very high authority" is, no doubt, a reference to Wigmore. The passage he quotes is to be found in Wigmore on Evidence, 3rd ed. 1940, s. 1747. This forms part of a voluminous discussion of exceptions to the hearsay rule, and is under the particular title "Spontaneous Exclamations (*Res Gestae*)". This same passage from Wigmore was quoted by the late Mr. Justice Riddell in the course of his judgment in *Jarvis v. London Street R.W. Co.* (1919), 45 O.L.R. 167, 48 D.L.R. 61, commencing at the foot of p. 173 and continuing on p. 174. Mr. Justice Riddell, later in his judgment, after referring to the discussion of these principles by other authors, says: ". . . but the most philosophical and satisfactory to my mind is to be found in Wigmore on Evidence, vol. 3, sec. 1747." He continues: "This learned author's state-

ments must, in all cases, however, be read with caution, as is the case with any American text-books, as he gives greater weight to the decisions of the Courts of the United States and of the various States of the Union than we are accustomed to do." Mr. Justice Riddell concludes his judgment in the case cited by stating his opinion that the evidence there under consideration was properly excluded. On p. 175 he remarks that: "Cases in our own Courts are not numerous." He cites two Ontario cases, but in neither of them was the evidence admitted. The other judges in the *Jarvis* case were likewise of the opinion that the evidence was properly excluded in that case.

This suggested exception from the hearsay rule is clearly distinguishable from the well-known exception in the case of dying declarations in cases of homicide.

As Wigmore says in his discussion of the rule now under review, "The death, absence or other unavailability of the declarant need never be shown under this exception".

In the case of dying declarations in cases of homicide it must not only be shown that death occurred, but it must also appear clearly that when the declaration was made the deceased was under a sense of impending death. I assume it was because there was no satisfactory evidence that the deceased here was under a sense of impending death that the Chief Justice did not deem this case to come within the exception of dying declarations in cases of homicide. In any event he made no ruling such as would be required before admitting the evidence under that exception.

In s. 1746 Wigmore says in regard to the exception of "spontaneous exclamations": "There was a time when the state of the judicial precedents was such that no established Exception of this tenor could yet be said to exist. But now, and for a generation past, it does exist, under one or another guise of phraseology." He cites two cases in England, one a decision of Lord Holt in 1693, in a case of *Thompson et ux. v. Trevanion* (1693), Skin. 402, 90 E.R. 179, and *Aveson v. Kinnaird et al.* (1805), 6 East 188, 102 E.R. 1258.

I do not find in any of the English text-books that I have examined any such subdivision of the exception made to the hearsay rule, in the case of statements forming part of the *res gestae*, as that discussed by Wigmore under the sub-heading

"Spontaneous Exclamations", although the admissibility of declarations properly forming part of the *res gestae* is a subject discussed at length. Phipson, in discussing exceptions forming part of the *res gestae*, makes the general statement: "The declarations are no proof of the fact they accompany; the existence of the latter must be established independently. Nor, although admissible to explain or corroborate, are they, in general, any evidence of the truth of the matters stated." (Phipson, *op. cit.*, p. 61.) He says further that there is no distinction with regard to the admissibility of the declarations between civil and criminal proceedings.

Some writers on the subject are of the view that to regard declarations that are part of the *res gestae* as exceptions from the hearsay rule is really a confusion of terms, and that their admission in evidence does not, in truth, constitute an exception, for the reason that such declarations or statements, when admitted, are only admitted as evidence that the statement was made, and not as evidence of the truth of any fact they contain: see Best on Evidence, 12th ed. 1922, p. 417.

Reference may also be made to vol. 13 of Halsbury's Laws of England, 2nd ed. 1934, pp. 551-2, where it is said, as to the admissibility of evidence of incidents accompanying the act, that they must relate to, and can only be used to explain, the act they accompany, and not independent acts prior or subsequent thereto, and that although admissible to explain or corroborate, they are not, in general, to be taken as any proof of the truth of the matters stated, and that consequently this is not, in any strict sense, to be classed as an exception to the hearsay rule. See also Russell on Crimes and Misdemeanours, 8th ed. 1923, p. 1918.

A case that illustrates the application of the rule in England, and the application of it as stated by Wigmore, may be found in *Amy's v. Barton*, [1911] W.N. 205. In that case the Master of the Rolls pointed out what, in his opinion, was an error on the part of the trial judge in an Irish case of *Wright v. Kerrigan*, [1911] 2 I.R. 301, where evidence had been admitted of statements made by the deceased man to his medical attendants as to his symptoms and their cause. The Master of the Rolls pointed out that the words "and their cause" could not be supported. A statement of his symptoms would be

merely a statement as to his physical condition, and, therefore, admissible as part of *res gestae*.

The only case I have found in the Supreme Court of Canada dealing with the matter is *Gilbert v. The King* (1907), 38 S.C.R. 284, 12 C.C.C. 127. Certain statements that had been admitted as part of the *res gestae* were held in any event to be admissible. One of the statements in question was held to be admissible as part of the *res gestae*, as there defined. The other statement was admissible on the ground that the words spoken were uttered in the presence and hearing of the accused, and under such circumstances, in the light of what he had previously stated, that he might have been reasonably expected to make some answer or remark in reply thereto.

It may well be that the question of the admissibility in the present case of the declaration of the deceased on his way downstairs may be disposed of on the ground that his statement did not form any part of the *res gestae*. The fighting had ceased. No one was pursuing the deceased or seeking to continue the struggle. The argument was advanced for the Crown that the statement of the deceased was made in the presence or hearing of the accused and no answer was made. It does not seem to me that this argument carries the matter any further: see *Rex v. Christie*, [1914] A.C. 545.

It is pointed out by a number of text-writers that an important reason against the admission of such a statement is that there has been no opportunity to cross-examine the person who made the statement, to ascertain his knowledge, or means of knowledge, of what he has stated. There is no finding in this case that the statement was made by the deceased in the expectation of death. Our rules of evidence do not seem to extend to cover a case of spontaneous exclamations, in the broad terms stated by Wigmore. My opinion is that, upon this ground alone, the appeal should be allowed and judgment entered as hereinbefore stated.

Acquittal directed.

Solicitors for the appellant: Nathan Phillips & Phillips, Toronto.

[BARLOW J.]
[COURT OF APPEAL.]

Strauss v. Bowser.

Sale of Goods—Express Warranties—Whether Warranty Extends to Future—Sale of Bull for Breeding Purposes—Whether Breach of Warranty Established by Evidence.

The plaintiff, a breeder of cattle, bought a bull from the defendant, who gave a written warranty as follows: "This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you." The bull was transported by truck from Ontario to the defendant's farm in the State of Virginia, and no attempt was made to use it for breeding purposes until five months later, when it was discovered to be incapable of serving cows, because of a malformation. The plaintiff sued for damages for breach of warranty. The trial judge, rejecting expert evidence to the effect that the defect was congenital, found that the bull was normal when the plaintiff took delivery, and conformed to the warranty given, and that it might have been injured in transit. He accordingly dismissed the action. The plaintiff appealed.

Held (Hogg J.A. *dissenting*), the appeal should be dismissed. The case made for the plaintiff was met by the case made for the defendant, and the trial judge accepted the case of the defence. No reason had been shown for differing from his opinion.

Per HOGG J.A., *dissenting*: Although the general rule is that a warranty relates only to facts as they are at the time of the sale, a warranty may be made to relate expressly to the future. Benjamin on Sale, 7th ed. 1931, p. 698; *Kyle v. Sim*, [1925] S.C. 425, quoted. In view of the terms employed, and particularly of the words "I guarantee him to be a breeder for you", the warranty here given should be considered as extending to the future, and not as relating only to the condition of the bull at the time of the sale. The delay of five months before attempting to use the bull for the purpose for which it was bought was satisfactorily explained in the evidence, and should not be taken as negating the warranty.

AN APPEAL by the plaintiff from the judgment of Barlow J., *infra*, dismissing an action for damages for breach of warranty.

10th and 11th May 1950. The action was tried by BARLOW J. without a jury at Toronto.

A. H. Young, K.C., and S. P. Parker, for the plaintiff.

A. A. Macdonald, K.C., and L. C. Lee, for the defendant.

19th May 1950. BARLOW J.:—The plaintiff's claim is for damages based on a warranty given by the defendant to the plaintiff with respect to an Aberdeen Angus bull purchased by the plaintiff from the defendant.

At the request of counsel for the parties, the jury notice was struck out.

The bull in question was purchased by the plaintiff from the defendant on or about the 20th November 1948, and the following warranty was given by the defendant:

“Newmarket, Ontario,
November 20, 1948.

To: Mr. William L. Rodman,
Brandy Rock Farm,
Brandy, Virginia.

“This is to certify that the Aberdeen-Angus bull, Blackcap of Maple Gables 23rd—85813—, has sired calves on my farm. This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.

“John W. Bowser.”

Delivery of the bull was taken by the plaintiff at the defendant's farm in Newmarket on or about the date of the warrant, namely, the 20th November 1948, and it was taken by truck, along with two other animals, to the plaintiff's farm in Virginia, a distance of some 700 or 800 miles, arriving there on the 27th November 1948.

Ownership passed and responsibility for the animal became the plaintiff's when the bull was taken from the defendant's farm at Newmarket.

The bull was purchased for breeding purposes, but was not used for the purpose until about the 1st April 1949, when the plaintiff found that the bull then had a deformity which made it unsuitable for the purpose for which it was purchased. On the 15th April 1949 the plaintiff so advised the defendant, and demanded the return of the purchase price and damages suffered.

The experts called by the plaintiff are of the opinion that the deformity is congenital and that the bull has always suffered from it, and has been incapable by reason thereof. As opposed to this is the direct evidence of the defendant, his herdsman, an employee, and Mr. Bailey, a farmer who kept the bull from July 1948 to about the time of purchase by the plaintiff in November 1948. The defendant and these witnesses impressed me by their demeanour in the witness-box and I accept their evidence. The experts called by the plaintiff were at best only expressing an opinion, which, at times, was not based upon premises, that particularly impressed me. This is shown by the evidence of Dr. McIntosh, a veterinarian of very wide experience, who was called by the defendant. Evidence as to facts, given by witnesses whose evidence is acceptable to the Court, should be preferred where it conflicts with opinion evidence of experts. In this case

I have a stronger preference for the factual evidence and accept it.

The bull may very well have suffered an injury resulting in the deformity found by the plaintiff on the long truck trip to Virginia, or during the period that elapsed from November 1948 to April 1949. Mr. Bailey's evidence shows that the bull was normal and without the deformity that is alleged as late as November 1948.

I find that the bull conformed to the warranty given when delivery was made to the plaintiff at Newmarket.

I should assess the plaintiff's damages.

The purchase price was \$1,800. There should also be allowed in assessing damages one-third of \$215.55, being the trucking charge for three animals, including the bull, from Toronto to Virginia, amounting to \$71.85; payment to a customs broker of \$2; insurance on the bull \$30; and transfer of the register \$1.50. The plaintiff is also claiming \$390 on the basis of \$1 a day for 390 days for the feeding and the care of the bull from 15th April 1949 to the date of the trial. In view of the fact that this animal was cared for along with a considerable number of other animals, it would appear to me that \$1 a day is a little too much. I propose to allow 75 cents per day for 390 days, equalling \$292.50. Plaintiff also makes a claim for \$620 for the loss of the profit on feeder calves. The evidence as to this shows that it is quite remote and uncertain, and I am of the opinion that no amount should be allowed. This makes a total of \$2,197.85, from which should be deducted the price which would be obtained for the bull for slaughtering, amounting, according to the evidence, to at least \$330, making the net amount \$1,867.85. I assess the plaintiff's damages at \$1,867.85.

The action will be dismissed with costs.

Action dismissed with costs.

5th December 1950. The appeal was heard by HENDERSON, HOGG and BOWLBY JJ.A.

A. H. Young, K.C. (S. P. Parker, with him), for the plaintiff, appellant: The trial judge said that he preferred the factual evidence called by the defendant to the opinion evidence of the experts, but in saying this he overlooked the circumstance that the experts gave more than mere opinion evidence, and also testified as to facts. The defendant made a great deal of the evidence

that this bull had sired calves, but Dr. McDonald gave evidence that it was possible for a bull to fertilize a cow, and later to become incapable of doing so. Dr. Bendix made his first examination on 15th September 1949, and said that at that time the bull had a congenital deformity, which could not have been the result of any injury. He based this opinion on the fact that there was no evidence of any wound, or any scar tissue visible. He expressly stated that he believed that this deformity must have existed from birth. The learned trial judge accepted the evidence that the bull had a defect in April 1949 when the plaintiff first attempted to use it for breeding purposes.

Because of the deformity it was impossible for us to use the bull for the purpose for which we bought it, and we are therefore entitled to relief. Further than this, however, the defendant gave us an express warranty that the bull would be a breeder, and we have been unable to use it for breeding. The warranty must be construed as meaning that the bull "will be a breeder for you", and therefore relates to the future, when we have an opportunity of using the bull for breeding. The warranty would take effect when we first had an opportunity of testing the bull; when it was put to work it had to measure up to the warranty.

The lapse of time before attempting to use the bull for breeding cannot be against us. The bull had just come from the show-ring, and was not in a proper condition for breeding, and had to be fitted. Its weight had to be reduced, and that could not be done quickly. Further, it was established in evidence that the breeding season did not begin in Virginia until April.

The herd book produced by the defendant contains no record of cows born on the defendant's farm sired by this bull. Evidence was submitted of the registration of calves sired by this bull; this evidence was not admissible to prove that the bull had sired calves, but only to prove the fact of registration.

The bull might have served cows in Ontario, but the fact remains that it was unable to do so in Virginia, which is what it was warranted to be able to do.

A. A. Macdonald, K.C., for the defendant, respondent: The warranty must relate to the day the bull is sold, not to some time far in the future. It is not a warranty that the bull "will be a breeder". Any warranty as to a chattel relates *prima facie* to the time of delivery: 1 Halsbury, 2nd ed. 1931, p. 561, para.

965. It would be monstrous if we were called upon to answer five months after we lost possession of the animal. What happened to the bull after it left our possession is known only to the plaintiff. Our responsibility ceased when it left our farm. [HENDERSON J.A.: The warranty says: "I guarantee him to be a breeder for you." Is that not a guarantee for the future?] No. The warranty is in the ordinary language of ordinary people and must be so construed. It cannot be that this warranty imposed an indefinite burden on us. Suppose the bull had not been used until the second year after the sale. The plaintiff did not tell us that he did not propose to use it until the following April.

The pleadings grammatically refer only to the time of sale. The plaintiff pleaded: "That the said bull was not then [*i.e.*, at the time of purchase] sound in that the bull had a congenital defect that rendered it impossible for the said bull to serve a cow." This was the case that we successfully met at the trial. The plaintiff cannot now place his case on a wholly different basis, and argue that the bull was unsound five months after the date of sale.

This case can have serious consequences to the defendant; if the evidence called for the plaintiff is accepted it will mean that we have been guilty of numerous false registrations.

The evidence of the plaintiff's witnesses is in many respects inconclusive, and there are many weaknesses in the expert evidence. The veterinarian who was first called to examine the bull, in April 1949, was not called as a witness at the trial; instead the plaintiff called Dr. Bendix, who made his first examination in September, ten months after we parted with the animal. His evidence was greatly weakened on cross-examination. As against the theoretical evidence offered on behalf of the plaintiff there was the direct evidence of the defendant and his witnesses to the effect that the bull had in fact served cows and sired calves which were duly registered in the usual course. The learned trial judge was right in his findings, and they cannot with propriety be disturbed. The argument now made, that the warranty extended to the future, is not the case that we were called upon to meet at the trial.

A. H. Young, K.C., in reply: Quite apart from the express warranty, there is a breach of the implied warranty that the animal will be fit for the purpose for which it was intended,

under s. 15 of The Sale of Goods Act, R.S.O. 1937, c. 180. A bull is a domestic animal, and the Act therefore applies to it.

Cur. adv. vult.

28th December 1950. HENDERSON J.A.:—This is an appeal from the judgment of Mr. Justice Barlow of the 19th May 1950, dismissing with costs an action brought by the plaintiff to recover \$1,800, the purchase price of an Aberdeen Angus bull named "Blackcap of Maple Gables 23rd", and the sum of \$1,500 for expenses.

The case made for the plaintiff before the learned trial judge was met by the case made for the defendant and the learned trial judge accepted the defence and found the facts to be as made by the defence. I can see no reason for differing from the opinion of the learned trial judge and would therefore dismiss the appeal with costs.

HOGG J.A. (*dissenting*):—This appeal is from the judgment of Mr. Justice Barlow dated the 19th May 1950, dismissing the action brought by the appellant for breach of warranty in connection with the sale of an Aberdeen Angus bull by the respondent to the appellant. The appellant is the owner of a large stock farm in the State of Virginia, one of the United States of America, and has on this farm some 400 head of cattle. Mr. William Rodman, who is the farm manager for the appellant, came to Ontario in November 1948 to purchase an Aberdeen Angus bull to add to the appellant's herd. He was directed to the respondent, who is a breeder of the above-mentioned type of cattle, and at the respondent's farm near Newmarket he purchased from the respondent a bull known as "Blackcap of Maple Gables 23rd", for the price of \$1,800. The respondent was aware that the appellant was purchasing the bull for breeding purposes and offered to and gave a warranty in writing, the effect of which is in issue in the action. The warranty is as follows:

"Newmarket, Ontario,
November 20, 1948.

To: Mr. William L. Rodman,
Brandy Rock Farm,
Brandy, Virginia.

"This is to certify that the Aberdeen-Angus bull, Blackcap of Maple Gables 23rd—85813—, has sired calves on my farm. This

bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.

“John W. Bowser.”

The appellant claims that the bull had a congenital defect which rendered it unsound and worthless for breeding purposes. The respondent admits giving the said warranty but pleads that at the time of the sale the bull was sound, had no congenital defect, and was a breeder. In the alternative he pleads that if the bull was not sound subsequent to the sale, such condition arose after it was in the custody of the appellant and that in any event he is released from the warranty because of the lapse of time between the date of the purchase in November 1948 and the month of April 1949, when he was notified by the appellant that the bull was unsound.

The evidence given on behalf of the appellant is to the effect that the bull was transported by truck to the appellant's farm in Virginia, arriving there on the 27th November 1948. Prior to the sale the bull was in what is termed by cattle-owners a “highly fitted condition” for show purposes and was, therefore, according to the evidence given by Mr. Rodman, too heavy at the time for breeding purposes. The bull was kept by the appellant on a maintenance diet, was housed and exercised daily and was reduced in weight from 1,800 pounds to 1,500 pounds.

In April 1949, for the first time while in the possession of the appellant, the use of the bull was required for breeding purposes, but the animal refused over a period of several weeks to serve the purpose for which he was purchased. The reason for the delay of five months from the date of sale to the following April, in attempting to make use of the bull, as explained by Mr. Rodman, was because the breeding season on the appellant's farm did not commence until April in order that there would be calves born in January, February and March of the following year for show purposes; also because the bull could not be used for some time after the delivery to the appellant on account of its highly fitted condition.

A veterinary surgeon was called to examine the bull on the 14th April 1949, and pointed out to Mr. Rodman a certain malformation with respect to the animal. Dr. W. L. Bendix and Dr. R. J. McDonald, both qualified veterinary surgeons, and

graduates of the Ontario Veterinary College at the city of Guelph, testified that the bull could not be used for breeding on account of a congenital defect. Dr. McDonald made his examination of the bull at the appellant's farm in Virginia on the 5th May 1949, and Dr. Bendix examined the bull on the 15th September following. Dr. Bendix testified that an injury would not produce a condition such as was present in the bull. Dr. R. A. McIntosh, who is the head of the Department of Medicine at the Ontario Veterinary College, was called as a witness by the respondent. He had never seen the bull in question, but gave it as his opinion that there are occasions when, although congenital "deviations" or "lesions" may exist in a bull, it may serve a cow but later become incapable of doing so. Dr. McIntosh was also of the opinion that the defect in the bull was "an abnormality either from injury or congenital defect" and that he had never seen an injury to a bull resulting in a lesion such as was present in the bull in question.

The general principle of law with respect to a warranty is that it relates only to facts as they are at the time of the sale unless otherwise stated, but that it may expressly relate to the future. No particular form of words is necessary to constitute a warranty. In discussing a warranty extending to a future event, the learned author of *Benjamin on Sale*, 7th ed. 1931, p. 698, says:

"But the terms of the warranty and the facts of the case may show an intention that the limitation of time stipulated for in connection with the warranty should refer, not to the period of the seller's responsibility, as in the two preceding cases, but to the continuance during the time of the quality warranted . . .

"Lord Mansfield . . . said 'There is no doubt but you may warrant a future event.'"

Reference is made to the case of *Kyle v. Sim*, [1925] S.C. 425. In that case a warranty was given upon the sale of a cow, in the following terms: "Dairy cattle are warranted to calve at their proper time and correct in their teats only." The cow calved at the proper time, but a disease appeared in her teats. It was held that the warranty was not limited to the condition of the cow at the date of the sale. Lord Clyde said that the warranty was not limited to the date of the sale, and that:

"In both its parts, the warranty looked to the calving time, which was *in futuro*, though very soon. . . . Whether this particular form of warranty is usual or not, there is nothing out of the way about a *de futuro* guarantee regarding the health or capacity of a cow in such circumstances; . . ."

In *Natrass v. Nightingale* (1858), 7 U.C.C.P. 266, the defendant, who sold a horse to the plaintiff, warranted that it was "a good coverer and a sure foal-getter". The horse was placed in the possession of the purchaser in the month of August and in the following spring he used him for the purpose for which he was purchased. The horse turned out worthless as a foal getter and died while still in the plaintiff's possession. An action was taken for breach of warranty and the jury brought in a verdict for the plaintiff in the sum of £150 damages. This verdict was upheld on appeal. Draper C.J., who delivered the judgment of the Court, said that the measure of damages in such cases was the difference between the price at which the horse was sold and the actual value of the horse at that time if he had been what the defendant warranted him to be. He said that the principle seemed to be that the purchaser had the right to be placed in the same position as he would have been if the defendant had fulfilled his contract.

The warranty in that case was not held to be limited to the time of the actual sale.

In the present appeal there seem to be two main questions to be resolved: (1) Did the warranty extend to the future? (2) Did the appellant delay for too long a time subsequent to the sale of the bull before attempting to use it for the purpose for which it was purchased?

The respondent was aware of the purpose for which the bull was required by the appellant. He knew that it was to be used for breeding purposes. The respondent warranted the bull to be sound at the time of the sale, but, in addition, because of the expression "I guarantee him to be a breeder for you", extended the warranty to a future time when the appellant would make use of the bull for the purposes for which he was purchased. I think that the words "for you" mean not only that the bull was a "breeder" at the immediate time of the sale but that he would be a "breeder" at the time the appellant would make use of him for the purpose known to the respondent as the reason why the

bull was purchased. The words "This bull has sired calves on my farm. This bull is right and sound in every way to the best of my knowledge" were quite sufficient in themselves to constitute an express warranty that the bull was in the state or condition mentioned at the time of the sale. Nothing further was needed for such purpose, but, in my opinion, the vendor considered that he should extend the warranty to a future time and to express such intention he added the words, which I have already quoted, "and I guarantee him to be a breeder for you", the intention being to warrant that after the time of sale and when the appellant had possession of the bull it would continue to be a breeder for the appellant. If this is not the effect of the warranty, then the words "to be a breeder for you" are redundant, the warranty being complete in so far as the condition of the bull at the time of sale was concerned without the concluding words.

Turning to the other question, I think that the warranty would not be exhausted at the time the attempt was made to use the bull, that is, after a period of five months had elapsed from the time of the sale. According to the testimony given on behalf of the appellant, it was necessary that a certain time should elapse before it could be used for breeding, because the animal when purchased was in a condition required for show purposes but not for breeding purposes. Furthermore, the bull was not used at an earlier time because it was the custom on the appellant's farm not to breed cows until the month of April. It seems to me that these grounds are of weight and are reasonable in explaining why the aforesaid time elapsed. That the lapse of a certain period of time after a sale may be considered reasonable in view of the surrounding circumstances, and would not negative a warranty given with respect to the sale of a horse warranted for breeding purposes, is shown in the case of *Natrass v. Nightingale, supra*, where the delivery of the horse to the purchaser was in August and the horse was not used for breeding till the following spring.

There was evidence given by the respondent and several other witnesses that they had, prior to the sale, seen the bull serving cows. There was also put in evidence the Canadian Aberdeen Angus Herd Book, showing the registration of certain calves purporting to have been sired by "Blackcap of Maple

Gables 23rd". This evidence of the capability of the bull for breeding purposes before the sale would not, in my view, affect the issue that the bull was not capable of fulfilling the terms of the warranty, except as a matter for consideration in weighing the evidence as to the defect said to be present in the bull. In this case, as I see it, it is the condition of the animal when required for the purpose for which it was purchased that is material.

There is no evidence which contradicts the testimony given on behalf of the appellant that the bull was not capable of serving and did not serve cows in April 1949.

The evidence of the several veterinary surgeons establishes, in my opinion, that the bull did not suffer any injury while in the hands of the appellant; at any rate, no injury to which the bull's failure for breeding purposes could be attributed.

There is some evidence of special damage, such as the cost of transportation of the bull to Virginia, and an insurance premium, but I cannot find evidence which will enable the measure of damages to be ascertained upon the principle laid down in s. 51 of The Sale of Goods Act, R.S.O. 1937, c. 180. It is provided by subs. 3 that in case of breach of warranty of quality the loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty.

There was not sufficient evidence on the question of damages given at the trial.

I think the appeal should be allowed with costs and with costs of the trial and the judgment at trial should be set aside. There should be a reference directed to those matters concerning which a reference was directed by Meredith C.J.O. at p. 148 of his judgment in the case of *Wood v. Anderson* (1915), 33 O.L.R. 143, 21 D.L.R. 247*. The facts in that case were somewhat similar to those in the present case.

BOWLBY J.A. agrees with HENDERSON J.A.

Appeal dismissed with costs, HOGG J.A. dissenting.

Solicitor for the plaintiff, appellant: A. H. Young, Toronto.

Solicitor for the defendant, respondent: Lorne C. Lee, Aurora.

*In *Wood v. Anderson*, Meredith C.J.O., said: "The proper course, in these circumstances, is to direct a reference to ascertain what the horse is worth and the amount that should be allowed to the respondent

for keeping him for a reasonable time until he could have been sold, unless the appellant elects to pay this latter amount and to take back the horse; and, if he so elects, the horse is to be given back to him upon request; and, if the parties are unable to agree as to the amount to be allowed for his keep, there will be a reference to ascertain it. In case of a reference, further directions and the costs of the reference will be reserved to be dealt with by a Judge of the High Court Division in Chambers."

[TRELEAVEN J.]

McCoy v. Alliance Insurance Company of Philadelphia et al.

Insurance—Fire Insurance—Removal of Insured House—No Express Coverage in Policy—Knowledge of Insurer's Agent—True Contract between Parties.

The plaintiff bought lot A for the express purpose of moving a house from it to lot B, also owned by him, which was some distance away. An insurance agent (found on the evidence to have been the agent of the defendant company, with authority to issue policies for it) solicited the insurance, and a policy was issued by the defendant. By an error of the agent, when the policy was sent in for the addition of a mortgage clause, it was changed to cover the house on Lot B, although the moving had not then been begun. Before the moving operation was started the plaintiff had a conversation with the agent, in which he was assured that the house was covered during the move. The house was totally destroyed by fire while being moved, and the defendant refused payment on the ground that it was not covered.

Held, the defendant company was liable. The agent knew from the beginning that the house was to be moved from one location to the other, and this knowledge should be imputed to the company. If it had not been intended to insure the house in transit, there should have been an express exclusion from the policy and, since there had been no such exclusion, it should be held that the true contract between the parties was one whereby the house was covered on both properties and while in transit. *Renshaw v. Phoenix Insurance Company of Hartford, Conn.*, [1943] O.R. 223, distinguished.

Insurance — Fire Insurance — Notice and Proof of Loss — Inaccurate Statement in Proof of Loss Submitted—Insurer's Knowledge of True Facts and Failure to Object—Estoppel—The Insurance Act, R.S.O. 1937, c. 256, s. 106, stat. con. 15.

The proof of loss furnished by the plaintiff contained a clause stating that the property belonged exclusively to the insured, that no other person had any interest in it, and that there was no encumbrance or lien of any kind on it.

Held, the defendant could not rely upon this as a misstatement of fact, invalidating the claim under statutory condition 15 of the policy. It was part of the printed form and was inadvertently signed by the plaintiff. The company knew of the proposed mortgage and had attached the usual mortgage clause and consent, so that it could not possibly have been misled by the statement, and it took no objection until after action was brought. In these circumstances the company was estopped, since the imperfection might have been remedied if

objection had been taken promptly. Lavery, Insurance Law of Canada, 2nd ed., p. 240, quoted. Further it was not clear from the evidence whether the mortgage actually covered the house at the time of the fire.

AN ACTION for the value of a house destroyed by fire.

28th and 29th March 1950. The action was tried by TRELEAVEN J. without a jury at Owen Sound.

F. G. MacKay, K.C., for the plaintiff.

J. H. Amys, K.C., for the defendant company.

George Gardner, for the defendant Scott.

F. L. Dreger and J. E. Clement, for the defendant Sacks.

3rd January 1951. TRELEAVEN J.:—This is an action based on the loss of a house owned by the plaintiff, which was destroyed by fire while being moved from one location to another.

The plaintiff had purchased lot 20 in the 12th concession of the township of Amabel in the county of Bruce. The purpose of the purchase was to obtain ownership of the house on the said lands and it was the plaintiff's intention from the beginning to move the house to a location on other property which he owned, namely, part of lot 32 in the half-mile strip in the township of Arran in the same county.

The defendant Scott, who is an insurance agent, having learned in some way that the plaintiff had purchased the property, went out to solicit the insurance on the house. The plaintiff agreed to let him place the insurance and this was later allegedly done through the defendant insurance company.

The defendant Sacks is the owner of moving equipment consisting of a low trailer or float drawn by a tractor. The plaintiff had engaged the use of the equipment and services of a driver (who was Sacks himself) at \$7 per hour. The plaintiff also had the assistance of a number of other men who helped load the house on the float and accompanied it on its way to give assistance which might be required from time to time and presumably to help unload the house and place it on its new foundations.

The moving was started on Friday, 31st October 1947, and due to conditions along the way it was not completed that day and the house and equipment were left on the road until the following Monday. On that day the moving was again proceeded with, but some time during the morning tire trouble developed. At least one, or perhaps two, of the tires on the float went flat

and began to heat up (or possibly began to heat up and then went flat; the sequence is not clear), so that they were seen to be smoking. After some consultation it was thought it would be safe to move along some distance farther, notwithstanding the possibility of more serious trouble developing. It was a disastrous thought, for as the moving proceeded the tires began to blaze and before the fire could be controlled the house and float were completely destroyed. The defendant Sacks was, however, able to detach the tractor and drive it away in safety.

Under these circumstances, the plaintiff claims against the Alliance Insurance Company of Philadelphia for the loss sustained and, in the alternative, against the defendant Scott for negligence in failing to insure the house properly. He also claims damages against the defendant Sacks either for negligence or for breach of contract to move the house.

All the defendants deny liability and the defendant Sacks counterclaims for payment for his services and for damages for the loss of his float.

I find it convenient to deal first with the claim against Sacks and his counterclaim against the plaintiff. In the view I take of the facts, neither claim nor counterclaim can succeed. Each of these two parties seeks to blame the other for the decision to proceed farther after smoke was first discovered and after it was known that the tires were hot and flat. I cannot find that the decision was made exclusively by either of them. Sacks was driving the tractor; the plaintiff, as owner, also had some authority. There was consultation between them about the matter. Either one could have refused to proceed; neither did. I think it is a fair conclusion from the evidence that they mutually decided to proceed to a place some distance farther on, where it had been planned that the whole party would have lunch. The evidence of the defendant Sacks, which I accept, is that when he and the plaintiff were examining the flat tires he, Sacks, suggested they had better jack up the wheels and change the tires but McCoy said "No", and to go on because traffic would not be able to pass. Then Sacks admits that he thought a further distance of a quarter of a mile would not hurt as he had seven remaining good tires. So they went on. It is clear that if they had not gone on without remedying the situation there would have been no fire, and it is also clear that they were

in the end both consenting parties to proceeding; that is, they both consented to take the risk.

The issue regarding the insurance is more difficult. I find that the evidence establishes that the defendant Scott was the agent of the defendant insurance company and that he had authority to issue policies for the company. His agency contract with the company is filed as ex. 7. I also find that on the first occasion when he called on the plaintiff he was told that the house in question was going to be moved to the new location and that it would be vacant until moved and during the process of being moved. On that same occasion it was agreed between the plaintiff and Scott that he, Scott, would have the building insured for three years. No written application was made by the plaintiff. No mention was made of a written application at the interview just mentioned. An application was, however, written out later by Scott and to this he signed the plaintiff's name. That application is filed as ex. 1 and a typewritten copy of it (with the exception of "agent inspection information") is filed as ex. 2, and there is also a copy attached to the policy which was issued and which is filed as ex. 4. That policy was duly issued and delivered to the plaintiff and the premium was paid. It is to be noted that there are two copies of the application attached to ex. 4, and the other one will be referred to presently.

Some time shortly before the 5th September the plaintiff arranged to place a mortgage on the house in question and he took the policy to one Downs, a solicitor, by whom the legal work was to be done in connection with the mortgage, and left it with him to have the usual endorsement and mortgage clause attached. Mr. Downs and the defendant Scott share the same offices and Mr. Downs apparently spoke to Mr. Scott about the mortgage and Scott mailed the policy to the company with a covering letter or memo dated 5th September 1947. This letter is very difficult to understand because it says:

"Policy is enclosed herewith for Transfer of Interest to Wm. E. Foster.

"Building has also been removed to Pt. Lot 32 Half-mile Strip Township of Arran, County of Bruce. Kindly issue Removal Permit."

The fact is, of course, that the house had not yet been removed and no steps were taken toward moving it until 31st October. No answer to this letter was put in, nor apparently could one be found, but it is clear there was an answer because on 8th September Scott wrote again to the company as follows:

"I have yours of the 6th. inst., relative to the above and would say that I have contacted Mr. McCoy and he informs me that Part of lot 32 Half Mile Strip Tp. of Arran is the only property in which Mr. Foster will be interested and further that the Lot 32, HMS. is much better property than that on which the dwelling was originally located.

"As both Mr. McCoy and Mr. Foster are both reliable in every way, I will appreciate your permitting the transfer to go through as originally requested. The policy is now in your possession."

As I have stated, that letter of 5th September and also the letter of 8th September are difficult to understand. I do not believe that Scott intended deliberately to state an untruth or to mislead the company, but I think that, having known from the beginning that the house was to be moved, and the policy having now been brought in and left with Mr. Downs for the transfer of the mortgage interest, he assumed that as the mortgage was now being placed, the house had been moved to the new location. The company apparently issued a duplicate policy which is filed as ex. 4 and which is described as a certified copy of policy A86567, and it is to be noted that attached to both the policy and the copy is an application, typed but not signed, for insurance on the property for 1,052 days from the 5th September 1947, and describing it as situate on "Pt. Lot 32 Half-Mile Strip Township of Arran County of Bruce". It seems clear that the house in question was included as insured while on both properties, but there is no mention of its being covered while being moved from the one property to the other. When the policy came back from the company it was not delivered to the plaintiff immediately. The plaintiff in fact did not see the policy after its return from the company until he obtained it from Scott the day after the fire and he therefore did not know that the policy as written did not conform to what the contract really was, and did not cover the house while in transit.

It is quite understandable that no reference is made to the house while in transit because Scott, the company's agent, had erroneously written to the company that the house had already been moved to the new location and there could be no object in covering it while in transit if the moving had already taken place.

Considerable evidence was directed to an alleged conversation between the plaintiff and the defendant Scott, which took place in a restaurant in Owen Sound the day before the house was moved. The plaintiff says that he told Scott they were starting to move the house and that he wanted to be sure it was insured, and that Scott replied that it was and to go ahead and move it. Scott does not deny that this conversation took place but he does say he does not remember any such conversation. The plaintiff's brother, who gave some evidence to confirm that a conversation had taken place that day between the plaintiff and Scott, places it in an entirely different restaurant. I am satisfied, however, that the conversation took place, that the plaintiff was concerned to know that the house was covered by insurance, and that he was assured by Scott that it was.

I do not feel it necessary to review the many cases cited in the written arguments which have been submitted to me in this case. I find that the real contract of insurance was to cover the house on both properties and while in transit.

Counsel for both plaintiff and defendant argued rather extensively from the recent case of *Renshaw v. Phoenix Insurance Company of Hartford, Conn.*, [1943] O.R. 223, 10 I.L.R. 92, [1943] 2 D.L.R. 76. In that case the policy insured a number of cottages described as being situate on Stanley Island. One of the cottages was moved from the island to the mainland, some distance away, and after being moved it was destroyed by fire and the action was under the policy to recover the loss. The policy in that case contained the following limitations as to location: "all direct loss or damage by fire or lightning, except as hereinafter provided; to the following described property while located and contained as described herein, and not elsewhere." This limitation clearly distinguishes the *Renshaw* case from the present case.

In Laverty, *The Insurance Law of Canada*, 2nd ed. 1936, p. 156, there is the following:

"In order to avoid disputes on the question of location, policies should contain the words 'while located and contained as described herein, and not elsewhere' ".

In the present case the agent of the defendant company knew from the beginning that the house was to be moved from one location to another, the house was definitely identified and was insured for three years. It is quite clear that the company knew, through its agent, that the house was to be moved, and if it did not intend to cover the house while in transit, it should have excluded it by some words of limitation from the policy.

One other defence raised by the defendant company should be mentioned, namely: that the proof of loss does not comply with statutory condition 15, which makes delivery to the insurer of a particular account of the loss a condition precedent to action. Proof of loss was filed and is in evidence as ex. 6. One clause in the proof of loss has given me some concern, namely:

"The articles and property for which the claim is being made belonged exclusively to the assured and no other person, firm or corporation had any interest therein, and there was no encumbrance or lien of any kind on said articles during the currency of the above-mentioned policy."

The above clause is part of the printed form of the proof of loss and I am satisfied that it was inadvertently signed by the plaintiff. The insurance company knew of the proposed mortgage to be placed on the house and had attached the usual mortgage clause and consent, so that it could not possibly have been misled by the statement nor was any objection raised to it or the form of the proof of loss until after action was commenced. Moreover, it is not clear from the evidence that at the time of the fire the house was actually covered by the mortgage. If the statement in the letter of 8th September from Scott to his company is a true statement of fact the house would not actually be covered by the mortgage until affixed to the new location to which it was being moved, namely, part of Lot 32 in the half-mile strip, township of Arran. This matter is also dealt with in *Laverty, op. cit.*, at p. 240 as follows:

"If imperfect proofs of loss are filed *before* the expiration of the time stipulated for in the policy, and no objection is made to them until the prescribed time has elapsed, but the refusal to pay is put on other grounds, that constitutes an estoppel, as the

imperfections might have been remedied in due time if the objection had been properly made.”

The plaintiff claims the sum of \$2,500. This amount in my opinion is too high and does not represent the actual loss. He had purchased the property on which the house was first situated for \$2,800. After the removal of the house he sold the land for \$700 or \$750 (at the time of trial he was not sure which). I must take it that he sold it for \$750, which would represent the cost of the house to him at \$2,050. He claims there has been some appreciation in value of the house due to rising costs, but I am disposed to think that any appreciation would be at least offset by the depreciation of removing the house from its foundations and transferring it in the way in which it was being transferred, and I find that the fair amount of loss would be \$2,050.

In the result, therefore, the action will be disposed of as follows: The claim of the plaintiff against the defendants Scott and Sacks will be dismissed without costs, and the counterclaim of Sacks against McCoy will be dismissed without costs, and there will be judgment for the plaintiff against Alliance Insurance Company of Philadelphia for \$2,050 and costs.

Judgment accordingly.

Solicitors for the plaintiff: MacKay & McAvoy, Owen Sound.

Solicitors for the defendant company: Hughes, Agar, Thompson & Amys, Toronto.

Solicitor for the defendant Scott: George Gardner, Owen Sound.

Solicitors for the defendant Sacks: Clement, Eastman & Dreger, Kitchener.

[COURT OF APPEAL.]

Bothwell and Bothwell v. Gallaway and George H. Rundle & Son Company, Limited.

Motor Vehicles—Rules of the Road—Right of Way at Intersections—The Highway Traffic Act, R.S.O. 1937, c. 288, s. 39(1).

A collision occurred at the intersection of two country roads, between vehicles driven by B and G respectively. B had been driving north, and G had been driving east, and the collision took place about the centre of the east travelled portion of the road. The trial judge found that both vehicles approached the intersection at the same time, or so nearly at the same time that both proceeding at the same speed and without regard to each other a collision was unavoidable. *Held*, in view of this finding of fact, which was amply supported by the evidence, G was wholly responsible for the accident, and was liable in damages to the occupants of the other vehicle. *Canada Bread Company Limited v. Grigg*, [1946] O.W.N. 337; *Hersch v. Rasson and Derkatch*, [1946] O.W.N. 881; *Ludolph and Ludolph v. Palmer and Phillips*, [1950] O.R. 821, applied.

Motor Vehicles—Negligence—Evidence—Position of Vehicles after Collision—Value of Expert Evidence as to Speed, etc.

The position of vehicles after a collision between them is seldom, if ever, of assistance in determining the facts on which liability for damages must depend. The position where a vehicle comes to rest after a collision depends upon factors that are not known, or that are so inaccurately or incompletely given in the evidence as to be wholly unreliable as a guide in finding the cause of the collision.

It is usually confusing and misleading to use estimates of distances, speeds or times in calculations by an expert to determine the position of a vehicle or vehicles on a highway at any particular time. Even a small error in an estimate may lead to a wrong result of far-reaching consequences.

Judgment of MACKAY J., [1950] O.R. 377, affirmed.

AN APPEAL by the defendant company from the judgment of Mackay J., [1950] O.R. 377, in favour of the plaintiffs against both defendants. (Note: In the report of the trial judgment the name of the individual defendant is misspelled.)

19th and 20th October 1950. The appeal was heard by LAIDLAW, AYLESWORTH and BOWLBY JJ.A.

T. N. Phelan, K.C., for the defendant company, appellant:

1. Section 39(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, is inapplicable here, because it applies only where two vehicles approach or enter an intersection at the same time. The proper inference from the facts of this case is that Gallaway's car approached and entered the intersection first, and therefore he was under no duty to yield the right of way, and was not responsible for the accident: *Waterfield v. Tazzman*, [1949] 1 D.L.R. 529; *Marko v. Bristow*, [1949] 3 D.L.R. 785. The evidence

of the expert as to the speed of Gallaway's car before the accident was based on an entirely wrong assumption of fact. Bothwell's negligent failure to see Gallaway's car approaching and entering the intersection, and to avoid the collision, was the sole cause of the accident.

2. Gallaway was not our servant, and there is no basis for imposing vicarious liability upon us. There was no contract between Gallaway and the defendant company, an Ontario company; the only contract was between him and the Ohio company. In any event, it was a contract between principal and agent, not one between master and servant. The company had the right to tell Gallaway what to do, but not how to do it: *Chowdhary et al. v. Gillot et al.*, [1947] 2 All E.R. 541; *The Consolidated Plate Glass Company of Canada v. Caston* (1899), 29 S.C.R. 624.

3. The damages assessed under The Fatal Accidents Act, R.S.O. 1937, c. 210, were excessive.

E. A. Richardson, K.C. (*O. J. D. Ross*, with him), for the plaintiffs, respondents [directed by the Court to limit his argument to the first point argued on behalf of the appellant]: The trial judge has found that the rule of s. 39(1) as to right of way applies in this case, and there being evidence to support this finding the Court should not interfere with it. The Gallaway car was travelling at a higher speed than the Bothwell car. A driver owes a very high duty to look to his right, and it was not negligent for Bothwell, having looked to his own right and seen nothing, to proceed into the intersection.

T. N. Phelan, K.C., in reply.

Cur. adv. vult.

3rd January 1951. The judgment of the Court was delivered by

LIDLAW J.A.:—This is an appeal by the defendant George H. Rundle & Son Company, Limited from a judgment reserved by Mr. Justice Mackay after trial of the action without a jury at the city of Toronto on the 6th, 7th and 8th February 1950, and thereafter pronounced on the 14th April 1950. There is no appeal to the Court by the defendant Gallaway.

The action arises out of a collision between two motor vehicles at the intersection of a county road, running north and south, and a concession road, running east and west, in the

township of Burford, in the county of Brant. The distance between the east and west boundary lines of the county road is 66 feet, and the travelled portion of the road is 21 feet wide. The concession road is 54 feet wide from the north to the south boundary-line, and the travelled portion is 16 feet wide. There is no stop sign at the intersection. The collision occurred about 1 p.m. on the 10th December 1948, between a Chevrolet coach, driven in a northerly direction by the late William M. Bothwell, who was killed as a result of the collision, and a 1937 Ford coach, driven in an easterly direction by the defendant Gallaway. At the time of the accident Gallaway was in the employ of his co-defendant, the present appellant George H. Rundle & Son Company, Limited.

There were no witnesses of the accident, except the occupants of the two cars. The findings of fact which the Court must make depend upon inferences from the evidence, and I find it necessary, therefore, to state the facts in some detail. Gallaway was alone in the car. He suffered severe injuries, including concussion and amnesia. He had no recollection of the accident or of the events immediately before it. There were three persons in the front seat of the Bothwell car—the late Mr. Bothwell was the driver and was sitting on the left side of the car; his wife, Mrs. Doris Bothwell, sat in the middle; and his mother, Mrs. Eva Bothwell, sat on the right side. The occupants of each car had a possible view of the other car for more than 300 feet before reaching the intersection, but neither of the passengers in the Bothwell car saw the Gallaway car before the instant of collision. Mrs. Doris Bothwell says that when they were “three or four car lengths from the intersection” she looked to the left and saw nothing. A car-length is taken by counsel to be approximately 15 feet, and on cross-examination Mrs. Bothwell stated that when she looked to the left the car in which she was riding was between 45 and 60 feet south of the centre line of the intersection. Her view to the left at that time covered a distance of about 90 feet along the concession road. The speed of the Bothwell car as it approached the intersection, and up to the time of the collision, remained the same. It is fixed by Mrs. Eva Bothwell, who said that just before the intersection she looked at the speedometer and it registered 35 miles an hour. Mrs. Doris Bothwell estimated the maximum speed of the car at 40 miles an hour.

The Bothwell car struck the Gallaway car "right in the centre of the vehicle". The place of the collision on the intersection as determined by Provincial Constable R. I. Hazlett, who arrived at the scene shortly after the accident, was approximately in the centre of the east travelled portion of the hard paved road. That place was determined from a tire-mark 4 feet 11 inches long, which appeared to start at a point east of an imaginary centre line of the county road and south of an imaginary centre line of the concession road, and it extended in a north-easterly direction.

After the collision the Bothwell car came to rest facing in a southerly direction, at a distance of 35 feet measured north-easterly from the end of the tire-mark nearest to the car to the most southerly part of the car. It was 5 feet due west of the easterly limit of the pavement of the county road. The Gallaway car was also facing in a southerly direction, and it was 70 feet 8 inches from the westerly end of the tire-mark to the west side of the car. It was 52 feet from the easterly edge of the pavement of the county road to the nearest part of the car.

The learned trial judge made the following findings: "the point of impact was slightly east and north of the centre of the intersection"; "the Bothwell car was travelling, shortly before the moment of impact, between 35 and 40 miles per hour"; the speed of the defendant Gallaway's car was "substantially greater than that of the Bothwell car"; "the Bothwell car and the defendant's car approached the intersection at the same time, or so nearly at the same time, and at such a rate of speed that, both proceeding without regard to the other, a collision was unavoidable"; "the Bothwell car, being on the right, by virtue of s. 39(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, had the right of way"; "the failure of the defendant to obey the statute and yield the right of way was the sole cause of the accident"; "the defence has failed to establish . . . any negligence on the part of the driver of the Bothwell car". The learned trial judge also found as a fact "that the relationship existing between the defendant Kenneth Gallaway and the defendant George H. Rundle & Son Company, Limited was that of master and servant, and that when the accident occurred the defendant Kenneth Gallaway was acting in the course of his employment". He assessed the damages claimed under The Fatal Accidents Act, R.S.O. 1937, c. 210, at the sum of \$38,000, and in addition thereto

allowed the sum of \$250 for funeral expenses and \$500 for damage to the Bothwell car.

The grounds of appeal, as they appear in the memorandum filed by counsel on behalf of the appellant, are:

"A. That the defendant Gallaway approached and entered the intersection before Bothwell. There was no evidence of negligence on the part of Gallaway. Bothwell's negligent failure to see Gallaway's motor car and to avoid the collision was the sole cause of the accident.

"B. There was no contract between Gallaway and the defendant (Ontario) company and no ground of vicarious liability on the part of the latter. The defendant company had no interest in, or control over, the operation of the Gallaway car.

"C. Alternatively, upon the proper construction of the contract under which Gallaway was engaged, in the operation of his motor vehicle Gallaway was an independent agent and not a servant and the legal conclusion, respondeat superior, had no application in the circumstances.

"D. The damages assessed (\$38,000) under The Fatal Accidents Act were excessive."

At the conclusion of the argument by counsel for the appellant, the unanimous opinion of the members of the Court was that the learned trial judge was right in holding that the relationship of master and servant existed between the appellant and the defendant Gallaway at the time of the accident and that the defendant Gallaway was then acting in the course of his employment. The Court was also of the opinion that the sum of \$38,000 for damages assessed and allowed to the plaintiffs under the provisions of The Fatal Accidents Act was not so excessive as to warrant any interference by this Court. The opinion of the Court was announced, and counsel for the respondents was informed that it was unnecessary for him to address the Court in respect of those findings.

Much importance was attached by counsel for the plaintiffs to the place and position of the cars after the collision because he called an expert witness who made certain assumptions as to the relative position of the cars at that time and, based upon those assumptions, the expert expressed the opinion that "the eastbound car must have been travelling at a very higher [*sic*] speed, substantially, than the northbound car." On cross-examination, he ventured to say that 50 or 60 miles per hour

fitted with his theory. The assumptions made by the expert were that the Bothwell car, travelling northerly, "went approximately the same distance east as it did north", and that the Gallaway car, travelling easterly, "went about three times or more further east than it did north from the point of impact". Those assumptions were obviously wrong, and not in accordance with the facts as they appeared in evidence given by Provincial Constable Hazlett at a later stage of the proceedings at trial. The erroneous assumptions made by the expert, upon which his opinion was based, make his opinion of no weight or value whatsoever. I think that his evidence and his opinion should be wholly disregarded. It may be said, too, that the position of vehicles after a collision between them is seldom, if ever, of assistance to either party or to the Court in making findings of fact upon which liability for damages must necessarily depend. After a collision, the position where a vehicle comes to rest depends upon factors which are not known or are so inaccurate or incomplete in the evidence as to be wholly unreliable as a guide in finding the cause of the collision.

Counsel for the appellant argued, first, that the Court should find that the Gallaway car approached and entered the intersection before the Bothwell car. He referred to the plan filed, and showed from it that the Gallaway car travelled about 48 feet in the intersection, while the Bothwell car travelled a maximum distance of 27 feet and possibly only 20 feet, depending upon the position of the Gallaway car in the intersection at the time of the collision. He directed attention to the evidence that the maximum speed of the Bothwell car was 40 miles per hour, and endeavoured to demonstrate by computations that the Gallaway car was in the intersection before the Bothwell car. He then relied upon the decision in *Waterfield v. Tazzman*, [1949] 1 D.L.R. 529, and argued that the Gallaway car and the Bothwell car did not approach or enter the intersection at the same time within the provisions of s. 39(1) of The Highway Traffic Act and that those provisions as to right of way have no application to the present case. I cannot give effect to that argument. It was decided in *Waterfield v. Tazzman* that in the particular circumstances under consideration in that case the provisions of s. 39(1) of The Highway Traffic Act had no application, but the judgment did not in my opinion state a principle to be followed in all cases of the same class.

It is my opinion that the learned trial judge properly found on the evidence "that the Bothwell car and the defendant's car approached the intersection at the same time, or so nearly at the same time, and at such a rate of speed that, both proceeding without regard to the other, a collision was unavoidable". No doubt the learned trial judge had in mind, and gave effect to, the decision of this Court in *Hanley v. Hayes*, 55 O.L.R. 361, [1925] 3 D.L.R. 782, approved in *Van Camp v. Anderson and Carter*, 63 O.L.R. 257, [1929] 1 D.L.R. 429, varied *sub nom. Carter v. Van Camp, et al.*, [1930] S.C.R. 156, [1929] 4 D.L.R. 625, to which a corollary was added in *Sands v. Greer*, 65 O.L.R. 169 at 172, [1930] 3 D.L.R. 67; also *Gibb et al. v. The Sandwich, Windsor and Amherstburg Railway Company et al.*; *Mansfield et al. v. The Same*, [1948] O.R. 453, [1948] 3 D.L.R. 739. I accept the finding made by the learned trial judge and his conclusion that under the circumstances the Bothwell car had the right of way by virtue of s. 39(1) of The Highway Traffic Act.

I add this observation, that it is usually confusing and misleading to use estimates of distances, speeds or times in calculations to determine the position of a vehicle or vehicles on a highway at any particular time. Even a small error in an estimate may lead to a wrong result of far-reaching consequence. It is unsafe and perhaps impossible in the present case to find by computations or otherwise which vehicle actually entered the intersection first. The fact that can be and in my opinion must be inferred from all the evidence is the finding made by the learned trial judge, which has been accepted by me.

The Bothwell car was in open view of the defendant Gallaway as the two vehicles approached the intersection. If Gallaway had looked to his right at that time, he would or should have seen the Bothwell car, and it was his duty under the circumstances to yield the right of way to it. His failure to do so was negligence. If he did not look to his right, or did not exercise reasonable care in doing so, as he approached the intersection, he was equally negligent.

Counsel argues that: "Bothwell's negligent failure to see Gallaway's car and to avoid the collision was the sole cause of the accident." There is no evidence of any special circumstances from which the Court can properly find that Bothwell knew, or should have known, that there was danger of a collision if he exercised his right of way. In the absence of special circum-

stances, I think that Bothwell was entitled to assume that the defendant Gallaway would do his duty and yield the right of way, as required by the provisions of s. 39(1) of The Highway Traffic Act. I refer to *Canada Bread Company, Limited v. Grigg*, [1946] O.W.N. 337, [1946] 2 D.L.R. 374; *Hersch v. Rasson and Derkatch*, [1946] O.W.N. 881, [1947] 1 D.L.R. 95; and *Ludolph and Ludolph v. Palmer and Phillips*, [1950] O.R. 821. The onus of proof that there was negligence on the part of the late Mr. Bothwell that caused or contributed to the collision and damages resulting therefrom rested on the defendants, and I again agree with the learned trial judge that the defendants have not discharged that onus.

My conclusion and opinion is that the learned trial judge was right in finding that the negligence of the defendant Gallaway was the sole cause of the accident. The appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, respondents: Kennedy & Ross, Toronto.

Solicitors for the defendant company, appellant: Phelan, O'Brien, Phelan and Fitzpatrick, Toronto.

Solicitors for the defendant Gallaway: McBride & McGibbon, Waterloo.

[SPENCE J.]

Schlote v. Richardson.

Fraud and Misrepresentation—When Actionable—Falsity and Materiality—Knowledge or Recklessness of Defendant.

An innocent misrepresentation affords no cause of action for damages for deceit (*Gardner v. Merker* (1918), 43 O.L.R. 411 at 415; *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30, applied), although it may justify rescission of the contract induced by the misrepresentation (*Heatherly v. Knight* (1909), 14 O.W.R. 338; *Adam et al. v. Newbigging et al.* (1888), 13 App. Cas. 308, applied).

To support an action for damages for deceit a representation must be (1) false; (2) material; and (3) fraudulent, in the sense that it is made either with knowledge of its falsity or carelessly and recklessly, without caring whether it is true or false. A false statement made carelessly, or without reasonable ground for believing it to be true, is not fraudulent if it is made with an honest, though perhaps careless, belief in its truth, and such carelessness is merely evidence to be considered in determining whether or not the belief was an honest one. *Derry et al. v. Peek* (1889), 14 App. Cas. 337; *Redican et al. v. Nesbitt*, [1924] S.C.R. 135 at 154, applied.

Contracts—Rectification—Specific Performance with Abatement of Purchase-price—Fairness—Conveyance Completed.

A Court will not enforce specific performance of a contract of sale with an abatement of the purchase-price where it would be unjust or unfair to do so. *Earl of Durham v. Legard* (1865), 34 Beav. 611; *Rudd v. Lascelles*, [1900] 1 Ch. 815; *Bartlet v. Delaney* (1913), 29 O.L.R. 426 at 443, applied. Nor can compensation be recovered, after conveyance, in respect of a defect in title. *Debenham v. Sawbridge*, [1901] 2 Ch. 98 at 100; *Clayton v. Leech* (1889), 41 Ch. D. 103, applied.

AN ACTION for damages for deceit, or for alternative relief.

30th November and 1st December 1950. The action was tried by SPENCE J. without a jury at Sarnia.

H. L. Daufman, for the plaintiff.

B. H. Yuffy, for the defendant.

8th January 1951. SPENCE J.:—This is an action for damages in the amount of \$4,500 for alleged misrepresentation in the sale of a ladies' wear business from the defendant to the plaintiff or, in the alternative, for an order compelling rectification of the offer to purchase or the agreement between the parties and abatement of the purchase-price in the sum of \$4,500. The offer to purchase, filed at the trial as ex. 1, was dated 17th April 1950, and was accepted by the vendor under the date of 20th April 1950.

The offer appears to have been drafted by S. Freshman, an agent, or by one of his employees, and it contains the clause:

"The vendor represents and it is a condition of this offer that there is presently a lease upon the premises expiring February 19th, 1958, the rate of rent is to be (\$175.00) ONE HUNDRED AND SEVENTY-FIVE DOLLARS, monthly. The purchaser is to maintain the cost of the heating, lighting, gas and interior repairs of the premises occupied by the purchaser only."

The purchaser, the plaintiff, attended at Sarnia early on the morning of Sunday, the 23rd April, for the purpose of taking stock with the vendor, the defendant. The defendant only arrived in Sarnia late that day, and therefore stock was taken on Monday, the 24th April, and on Tuesday, the 25th April, the parties attended the solicitor in Sarnia who had been retained by both the vendor's solicitor, who practised in Windsor, and the purchaser's solicitor, who practised in Kitchener, to act as the agent for both of them. This solicitor drafted a memorandum to show the adjustments on closing, which was identified at the trial as ex. 5, and which memorandum was signed by both parties. He also drafted and had the vendor, the defendant, execute a bill of sale of the chattel assets and a declaration for the defendant under the provisions of The Bulk Sales Act, R.S.O. 1937, c. 184. The solicitor carried out the usual searches in the office of the County Court Clerk and then delivered to the vendor, the defendant, the plaintiff's cheque for some \$4,600, the amount due to the defendant upon the closing. The plaintiff had also executed and given to the solicitor, who delivered it to the defendant, her promissory note in favour of the defendant for the sum of \$4,788.34, the value of the stock found upon the inventory. It appears that at the closing of the transaction on the 25th April, the plaintiff brought up a question of the production of the lease held by the defendant and the assignment of it to her. The defendant stated that she had not the lease at hand, and asked the solicitor, who had drafted the lease in the first place, for production of a copy thereof. He was of the opinion that he had retained no copy, and he pointed out that the terms of the lease were set out in the offer to purchase and the parties could close on that basis.

On the 27th April the plaintiff, for the first time, met her landlord, and discovered that the lease of the premises (which lease she was assuming on the sale) did not provide for a rent of \$175 per month throughout its term to the 19th February

1958, but rather provided for a rental of \$175 per month only to the 1st February 1954, and thereafter \$250 per month to the 1st February 1959.

The plaintiff at once conferred in telephone conversation with the solicitor. The solicitor has given evidence as to these events and has produced his memorandum made that day of his conversation with both parties, which memorandum has been marked as ex. 6 at the trial. To summarize shortly that memorandum and the other evidence in reference to these circumstances, the defendant, Mrs. Richardson, obtained the original lease from the safety-deposit box in the bank and informed the plaintiff that she would be willing to make some type of adjustment, and then the defendant arrived in Sarnia on or about the 2nd May with an undertaking which she had had drafted by her solicitor, which she had executed, and which she tendered to the plaintiff. This undertaking has been marked as ex. 3 at the trial. The plaintiff took it and submitted it to her solicitor, and upon her solicitor's advice the plaintiff rejected this undertaking. At some time before the 9th May 1950 the defendant, through her solicitor, offered to rescind the whole transaction, returning to the plaintiff the moneys which the plaintiff had paid and which the defendant stated were still on deposit in the bank in Sarnia. The plaintiff also refused this offer by her solicitor's letter dated 9th May 1950, a copy of which has been marked at the trial as ex. 4.

I think it appropriate at this point to set out some findings of fact at which I have arrived after considering the evidence given by the various witnesses at the trial, which findings of fact must be considered as being based upon my opinion of the credibility of the various witnesses. *Firstly*: I believe that the plaintiff, Mrs. Schlote, did not know and had no means of knowing, or any suspicion, that the lease contained terms other than those outlined in the offer to purchase, until the 27th April, when she was so informed by Swartz, the landlord. *Secondly*: The defendant Mrs. Richardson, at the time she gave to the agent the information on which he drafted the offer to purchase, and at the time she accepted that offer, and at the time the transaction was closed in the solicitor's office in Sarnia on the 25th April 1950, did not remember that the lease provided for an increase in rental to \$250 per month; in fact, I am of the

opinion that she did not know the lease contained any such provision. I shall refer subsequently in more detail to these findings.

I believe that the defendant did offer to cancel the whole transaction and the plaintiff refused this offer, not however, for the reasons assigned by her at the trial, *i.e.*, that she had materially changed her position by moving from Kitchener to Sarnia and had made commitments to purchase goods, but rather because she was of the opinion that she had made a good bargain in purchasing the business and that she could obtain from the defendant a settlement for the misrepresentation which would be more advantageous to her than the undertaking of ex. 3 which the defendant had already offered.

An innocent misrepresentation affords no cause of action for damages for deceit: *Gardner v. Merker* (1918), 43 O.L.R. 411 415, 44 D.L.R. 217; *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; 23 Halsbury, 2nd ed. 1936, p. 78, although it may justify the rescission of the contract induced by such innocent misrepresentation: *Heatherly v. Knight* (1909), 14 O.W.R. 338; *Adam et al. v. Newbigging et al.* (1888), 13 App. Cas. 308. The present action, however is not for rescission but it is for damages, or in the alternative specific performance with an abatement of the purchase-price. In fact, the defendant offered to rescind the transaction and the plaintiff specifically refused to do so. I have found that, in fact, the defendant was innocent in the misrepresentation in that she did not know of this falsity at the time she made the representation. It must be decided whether, none the less, the misrepresentation is fraudulent in law.

Firstly: It is, no doubt, false as may be seen by comparing the offer, ex. 1, with the lease, which has been produced and marked ex. 2 at the trial.

Secondly: It is material. I think this is shown by the very words in which the representation is stated, "The vendor represents and it is a condition of this offer that there is presently a lease upon the premises expiring February 19th, 1958, the rate of rent is to be (\$175.00) ONE HUNDRED AND SEVENTY-FIVE DOLLARS, monthly. The purchaser is to maintain the cost of the heating, lighting, gas and interior repairs of the premises occupied by the purchaser only." The plaintiff has sworn that

she would not have entered into this contract if she had known the true terms of the lease. I am of the opinion that she was anxious to buy the business and would have done so if she had known the true terms of the lease, but I am ready to concede that she would have demanded and in all probability would have received more advantageous terms. At any rate, the representation is *prima facie* material, and likely to induce the plaintiff, and therefore the onus is thrown upon the defendant of showing that the misrepresentation did not induce the contract: *Barron v. Kelly et al.*, 56 S.C.R. 455, 41 D.L.R. 590, [1918] 2 W.W.R. 131, per Anglin J. at p. 482. Neither in cross-examination of the plaintiff nor upon her own evidence has the defendant discharged this onus.

Some evidence was adduced on behalf of the plaintiff in an attempt to show that the representation was false to the knowledge of the defendant when she made it. The plaintiff called as a witness Mrs. Henrietta McLean, who had been an employee in this Sarnia store and was still employed there by the plaintiff. It should be noted that the plaintiff had operated the store from the morning of the 25th April up to and including the trial. Mrs. McLean swore that during the Christmas season in 1949 she had noted that the store seemed to lose considerable opportunity for advantageous business due to the defendant's failure to carry a stock of accessories such as gloves, blouses and other ladies' wear, and she suggested to the defendant, prior to the end of 1949, that the defendant should sublet to her a part of the store, so that she might carry on a department in the store in which such accessories would be sold, and that the defendant postponed further consideration of that suggestion until "some time at the beginning of the year 1950". Mrs. McLean swore that then, during their abortive discussions toward such an agreement, the defendant mentioned that the rental was \$150 but would increase to \$275. Later in her testimony Mrs. McLean said the increase was to be to \$250 or \$275.

I accept the defendant's explanation that such conversation took place during the month of January 1949, when the rental under the terms of the lease and to her understanding was \$150, and when it would shortly increase to \$175, and that she said to Mrs. McLean that the rental would increase to \$175—not \$275 or \$250, and I regard Mrs. McLean's evidence as really bearing out the evidence of the defendant, that she never knew that

according to the lease the monthly instalments of rental would increase at any time beyond \$175.

The defendant has given evidence that she and her husband carried on two stores, one in Windsor and this one in Sarnia and that she looked after the buying and selling but all financial arrangements and the leasing were carried out by her husband; that as to the Windsor store they had first held a short-term lease and later a long-term lease, and that she executed both of these documents without having read them over, her husband having arranged them, and that when they rented this store in Sarnia it was a bare building which had been gutted by fire and that the arrangements to rent it were made between herself, her husband, and Mr. Swartz while standing in the bare and unheated building, and the latter two left to go to the solicitor's office and have the lease prepared, and as they left she stated her understanding of the arrangement which was about to be entered into, *i.e.*, a lease for nine years with the first year's rental to be \$150 per month and the subsequent years' rentals to be \$175 per month. She also testified that she was later called to the solicitor's office and executed ex. 2 without reading it over, believing it to incorporate the terms she had outlined and, in fact, stipulated; that her husband did not inform her, at any time, of any change in these terms and upon her husband receiving the lease by the mail in Windsor he simply took the document to the bank and placed it in his safety-deposit box and she had never known its terms until she had removed it from the safety-deposit box on the 27th or 28th April 1950.

I regard it as quite probable that the defendant's late husband would feel rather sheepish at having been persuaded by the landlord to enter into a lease of which the terms were much more onerous than those which his wife and partner had approved and, in fact, stipulated, that he would have delayed informing her of those onerous terms in the hope that the new business would prosper and so soften the blow when it fell in 1954. Unfortunately the defendant's husband died, leaving her with the operation of these two businesses in different cities, so that she was driven to sell the Sarnia one, the subject of this action.

I have concluded, upon this evidence, that the defendant did not know, at the time the representation was made, that it was false. I must now determine whether the representation was

made recklessly, without caring whether it was true or false, and was therefore fraudulent.

It is to be noted that Lord Herschell in *Derry et al. v. Peek* (1889), 14 App. Cas. 337, 58 L.J. Ch. 864 at 868, treats this classification of representation as merely an example of a representation made without an honest belief in its truth, so that a false statement made carelessly, or without reasonable grounds for believing it to be true, is not fraudulent if made with an honest though mistaken or perhaps careless belief in its truth and such carelessness is only evidence going toward the determination of whether or not the belief in the truth of the representation was an honest belief: *Derry et al. v. Peek, supra*; *Redican et al. v. Nesbitt*, [1924] S.C.R. 135 at 154, [1924] 1 D.L.R. 536, [1924] 1 W.W.R. 305.

As I have said, I accept the defendant's evidence that the representation was the exact understanding which she held when her late husband and the landlord left her presence to draft the lease and that she did not read the document either before executing it or after, until some days after the offer had been accepted and the deal closed, and that she had never been informed that the lease, as executed, varied from her initial understanding. I regard her understanding of the terms of the lease as being a reasonable one under the circumstances which I have outlined and I, therefore, am of the opinion that she did not recklessly misrepresent these terms. Indeed, it is difficult to understand how the defendant could have hoped to profit by any such recklessness. It was inevitable that the true terms of the lease would be revealed, and it was only the fortuitous circumstances that the defendant and the plaintiff were confused as to the arrangements for closing the transaction that prevented the production of the lease on closing. The plaintiff attended Sarnia for the purpose of taking inventory on Sunday, 23rd April and found that the defendant had not arrived, so telephoned her at Windsor and requested her to come at once. The defendant did so but, it being then Sunday afternoon, she could not obtain entry into the bank in order to remove the lease from the safety-deposit box in which it had lain since being deposited by her husband about 15 months before, so she was forced to go to Sarnia without the original document. It is interesting to speculate whether, if the plaintiff had been informed on Monday, 24th April that the lease called for payment

of rental of \$250 per month from the 1st February 1954 to the 1st February 1959, she would have refused to carry out the transaction. I suspect that she would not have so refused and her subsequent refusal to rescind the transaction, when such course was offered to her, confirms this suspicion. As I have said, I am of the opinion that such refusal to rescind was not because she had changed her position materially but rather because she realized she had made an excellent bargain in buying for \$5,000 cash and \$1,500 spread over a year, plus the inventoried value of the stock, a business upon which the defendant had spent over \$9,000 since February 1949 and which the defendant had built up to a gross trade of about \$3,800 per month. I am also convinced that the plaintiff was sure of the defendant's anxiety, believing that the defendant felt keenly her false position and would remedy it by entering into an arrangement even more advantageous to the plaintiff than the undertaking she offered in ex. 3.

In view of all the evidence, therefore, the defendant's husband's arranging of the financing and leasing details of both stores, his subsequent death, and the defendant's readiness to remedy the misrepresentation, I am of the opinion that her representation was not made recklessly without regard to whether it was true or false but rather was made with every belief in its truth and with good reason for such belief. I therefore find that I must dismiss the plaintiff's claim in so far as it is one for damages for deceit.

There remains the claim of the plaintiff for rectification of the agreement and abatement of the purchase-price. That claim, I think, may be shortly disposed of upon two grounds:

Firstly: A Court will not enforce specific performance with compensation when to do so would be unjust and unfair: *Earl of Durham v. Legard* (1865), 34 Beav. 611, 55 E.R. 771; *Rudd v. Lascelles*, [1900] 1 Ch. 815, per Farwell L.J.; *Bartlet v. Delaney* (1913), 29 O.L.R. 426 at 443, 17 D.L.R. 500.

I am of the opinion that here to enforce a compensation or abatement of purchase-price in the amount of \$4,500 would be most unfair and unjust. The plaintiff is receiving the benefit of over \$9,000 spent by the defendant upon the premises in the 15 months prior to the execution of the agreement and also the benefit of the defendant's building up of what would appear to be a thriving ladies' wear business during that interval. As I

have noted, this would appear to be the plaintiff's own estimate of the desirability of her bargain, and to reduce the price which she has to pay for the business by \$4,500 would approach a confiscation of the defendant's interest in the business. Moreover, I cannot see how I could arrive at any other abatement than the sum of \$4,500 and the inability to do so was cited by Lord Justice Farwell in *Rudd v. Lascelles*, *supra*, as being a ground for the refusal to award compensation.

Secondly: Compensation cannot be recovered, after conveyance, in respect of a defect in title: *Debenham v. Sawbridge*, [1901] 2 Ch. 98 per Byrne J. at p. 100, quoting *Clayton v. Leech* (1889), 41 Ch. D. 103.

I therefore dismiss the plaintiff's action with costs.

Action dismissed with costs.

Solicitor for the plaintiff: Harold L. Daufman, Kitchener.

Solicitors for the defendant: Yuffy & Yuffy, Windsor.

[COURT OF APPEAL.]

Nowakowski v. Martin.

Fatal Accidents—Right of Action on Behalf of Widow and Children—Effect of Separation Agreement between Spouses—Reasonable Probability of Reconciliation.

The fact that a married woman has entered into a separation agreement with her husband, renouncing all claim to maintenance from him, will not of itself preclude her from recovering damages under The Fatal Accidents Act if the husband is killed as the result of the negligence of a third person. If the Court can come to the conclusion, on the evidence, that there was a reasonable probability (rather than a mere possibility) of a reconciliation between the spouses, then it can be said that the widow has suffered a pecuniary loss through the death, and she will be entitled to damages. *Barnett v. Cohen et al.*, [1921] 2 K.B. 461; *Stimpson v. Wood and Sons* (1888), 59 L.T. 218, discussed. The existence of the separation agreement, however, will be a material factor in assessing damages.

The existence of a separation agreement between husband and wife cannot in any case prevent recovery on behalf of the children of damages under The Fatal Accidents Act, even if the wife has by the agreement assumed full responsibility for the support and maintenance of the infants. A father cannot contract himself out of his obligation to support and maintain his children.

AN APPEAL by the defendant from the judgment of King J. in an action under The Fatal Accidents Act, R.S.O. 1937, c. 210.

7th November 1950. The appeal was heard by ROBERTSON C.J.O. and ROACH and MACKAY JJ.A.

J. W. Thompson, K.C., for the defendant, appellant: The evidence does not go far enough to justify the application of s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288. The plaintiff has not proved that the loss or damage was sustained by reason of our motor vehicle. She has not shown that any act, negligent or otherwise, of the defendant was the cause of her husband's death; he may have had a heart attack. There was no evidence to show that the bicycle had been hit by the automobile; the tire of the car may have gone over the bicycle after it fell in the loose gravel. [ROBERTSON C.J.O.: Surely the subsection is intended precisely for a case where the injured person does not know how the accident happened.] In *Wakelin v. The London and South Western Railway Company* (1886), 12 App. Cas. 41, it was held that the defendant could not be liable, since there was no explanation for the accident; see also *Askin et al. v. The Canadian Pacific Railway*, [1938] O.R. 172, [1938] 2 D.L.R. 281.

The separation agreement constitutes a bar to the plaintiff's right to recover damages on her own behalf or on behalf of the children. The deceased and his family had been living under

distressing conditions, which led to the making of the separation agreement. It is not reasonable to suppose that either the plaintiff or the children would have had any pecuniary benefits from the deceased if he had lived. The children would not have had any reasonable expectation of support from their father, regardless of the agreement. The possibility of a reconciliation between the plaintiff and the deceased was too remote to be considered.

In any event, the damages awarded are excessive.

Mayer Lerner, for the plaintiff, respondent: The injury was clearly the result of the defendant's motor vehicle, and the onus of disproving negligence was therefore on the defendant under s. 48(1) of The Highway Traffic Act. The defendant tendered no evidence at the trial, and relied entirely on the plaintiff's case. It is admitted in para. 3 of the statement of defence that there was a collision and the defendant, after that pleading, cannot escape the application of s. 48(1).

The separation is not a bar to the plaintiff's right to damages. She received no consideration. I rely on the reasons of the learned trial judge in this respect. The parties had been married since 1930, and had been separated only for months at the time of the accident. The deceased visited the children from time to time, bringing them gifts and clothing. There was a reasonable probability of a reconciliation. He died intestate, indicating that he did not intend to deprive the plaintiff and his children of his estate.

The damages awarded were not excessive.

J. W. Thompson, K.C., did not reply.

Cur. adv. vult.

10th January 1951. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the defendant from the judgment pronounced by Mr. Justice King following the trial of this action without a jury at the city of London.

The plaintiff is the widow of Walter Nowakowski who while riding his bicycle along the highway on the 4th June 1949 was killed as the result of alleged negligence on the part of the defendant in the operation of his motor car. The action was brought under The Fatal Accidents Act, R.S.O. 1937, c. 210, on

behalf of the plaintiff and her four infant children, Adam, John, Edward and Mary.

The learned trial judge found that the motor car owned and driven by the defendant was "involved in the accident" and that the defendant had not satisfied the onus placed upon him by s. 48(1) of The Highway Traffic Act, R.S.O. 1937, c. 288. He gave judgment for the plaintiff in the sum of \$13,450 and costs and apportioned the amount of that judgment as follows: To the widow in her capacity as administratrix of her husband's estate the sum of \$250 for burial expenses and in her personal capacity the sum of \$5,000; and to the infants the sums following: John \$2,000, Edward \$2,400, Mary \$3,800, which sums he directed should be paid into court to their respective credits. He found that the infant Adam had not suffered any damages.

There were three grounds of appeal argued by counsel for the appellant as follows: First, that the evidence did not warrant application of s. 48(1) of The Highway Traffic Act. Second, that a certain separation agreement entered into between the plaintiff and her husband barred the claims in this action. Third, that, in any event, the amounts at which the trial judge assessed the damages were excessive.

I now deal with those arguments in that order.

In his statement of defence the defendant pleaded "that at the time and place referred to in the statement of claim, he was proceeding legally and lawfully in his motor vehicle in an easterly direction overtaking a bicycle operated by the late Walter Nowakowski when suddenly and without any warning the said Walter Nowakowski, deceased, turned his bicycle directly into the pathway or into the side of the motor vehicle of the defendant and the defendant did not have any opportunity whatsoever to avoid a collision".

In the face of that pleading the onus created by s. 48(1) of the statute applies. The defendant cannot, by pleading that the collision was the result of the deceased's negligence, avoid the statute. Having by that pleading admitted the collision, the onus was on him to prove that the loss or damage resulting therefrom was not due to his negligence or improper conduct.

There were no witnesses to the actual collision and the defendant did not give evidence at the trial. There was nothing in the plaintiff's case at the trial that would exonerate the de-

fendant from blame or place any blame on the deceased, and in the result the statutory onus remained unsatisfied.

I pass now to the second argument advanced on behalf of the appellant.

The plaintiff was married to the deceased on 30th August 1930 in the Province of Alberta. The eldest child, Adam, was born in Alberta. The other children were all born in Ontario. It is relevant to this as well as to the third argument to state the dates of their birth. John was born on 4th September 1938, Edward on 15th August 1942, and Mary on 12th August 1945.

The parents lived together until on or about 28th October 1948, on which date they entered into a separation agreement and thereafter they continued to live apart. The consideration expressed in the agreement is the mutual covenants therein set out. They are as follows:

"1. The said husband and wife will henceforth live separate and apart from each other and neither will molest nor interfere with the other of them in any manner whatsoever.

"2. The said husband will immediately quit and leave the premises at 344 William Street at present occupied jointly by the said husband and wife, and will not molest nor interfere in any way with the wife in her enjoyment of the said premises.

"3. The wife will maintain herself without assistance from her husband and will not pledge his credit in any manner whatsoever whether for necessities or otherwise.

"4. The wife shall have the custody of the children of the marriage under the age of sixteen years and shall maintain and support such children herself without assistance from her husband and covenants that she will make no claim or take any action of any sort to compel her husband to contribute to their support.

"5. The husband covenants and agrees that he will not molest, interfere or annoy his wife in any way whatsoever, and covenants that he will not enter on or attempt to enter on the premises owned by the wife at 344 William Street, London, or any other premises where the wife may be permanently or temporarily residing.

"6. The husband covenants that he will not interfere in any way with the children of the marriage under sixteen."

The plaintiff gave evidence as to the circumstances leading up to this agreement and the reason for signing it. I cannot do better than quote from her evidence.

"Q. Why did you sign this separation agreement? A. The reason I signed it, I want to live peaceably at home.

"Q. What was wrong with the home when he was there? A. He was always drinking and fight with me and the children all the time.

"Q. Did he ever injure you in these fights? A. Yes, he was.

"Q. How often were you assaulted? A. Always when he come home drunk.

"Q. Why did you sign the agreement to keep yourself and the children with no assistance from him? A. The reason I did it because he always beat me up and row in the house all the time. We couldn't live no longer."

In the early part of 1946 another married couple, Mr. and Mrs. Wray, went to live with the plaintiff and her husband and continued to reside with them until August 1947. Mr. Wray gave evidence as to the conduct of the deceased in the home during that time. He stated that in the early part of 1947 conditions in the home were "not too bad", but commencing about April 1947 the deceased "got hostile and cruel". On one occasion—he could not fix the date—the deceased dragged his wife out of bed and was kicking her and the witness and his wife interfered and protected the plaintiff from continuation of the assault. According to the witness every Saturday the deceased would come home drunk and the whole weekend was almost a continual row, during which, on occasions, the deceased struck the plaintiff and knocked her down and otherwise abused her. The witness speaks of the police being called "to quieten him down", but whether that happened on more than one occasion is not clear from the evidence.

During that period the plaintiff and her husband were not living together as man and wife. The husband slept with the eldest son and on three occasions he kicked the son out of bed and the son sought refuge in the room occupied by Mr. and Mrs. Wray. Eventually the son left home. He returned and lived with the mother after the parents had separated.

At the time of the separation nothing was paid by the husband to his wife and after the separation nothing was contrib-

uted by him toward her support. She maintained herself, with some assistance from the eldest son, by taking in roomers.

After the separation the husband came to the home occasionally to see the children and gave them clothing from time to time and some money. Neither his visits nor his contributions to the children, as I read the evidence, were either regular or frequent.

The learned trial judge was of the opinion that the separation agreement was not a bar to this action as to the claim of the widow either on her own behalf or on behalf of the children. He felt, however, that it was an important factor in determining their probable pecuniary loss arising out of the death of the deceased.

As to the claim of the wife he felt it was not a bar for three reasons:

First, that having regard to all the circumstances, the length of time they had been separated, their ages—each of them was about 44 years old when they separated—the chances of a reconciliation were not remote, and that such reconciliation might result from some misfortune to one or other or both of them or from the husband's reformation.

Second, that if they had continued to live apart and the husband had eventually died intestate it was reasonable to assume that he would have left a larger estate than he did in fact leave and the plaintiff and the children in that event would benefit to a greater extent than they in fact have. On the other hand, if he died testate without adequately providing for her, she would have a claim under The Dependents' Relief Act, R.S.O. 1937, c. 214.

Third, that if the husband had lived and had been guilty of acts entitling the wife to a divorce the separation agreement would not have been a bar to a claim for maintenance.

On this appeal counsel for the respondent adopted the reasons of the learned trial judge and submitted further:

1. That there was no consideration to support the agreement.

2. That, notwithstanding the agreement, the plaintiff had a legal and enforceable right to maintenance.

I deal first with those additional reasons.

The agreement, not being under seal, requires consideration to support it: *McGregor v. McGregor* (1888), 21 Q.B.D. 424. However, there is consideration in the agreement passing from the husband to the wife, *viz.*, the relinquishment of any claim to the custody of the children. It is impossible to construe the agreement as though that consideration were only a *quid pro quo* for the wife's undertaking to be alone responsible for the maintenance of the children.

So long as the agreement remained in effect the wife had no legal enforceable claim against her husband for maintenance. They mutually agreed to separate and made their own terms, which included the solemn agreement by the wife to maintain herself. The terms of the agreement here in question are substantially different from the terms of the separation agreement in *Frémont v. Frémont* (1912), 26 O.L.R. 6, 6 D.L.R. 465. There the wife succeeded in an action for alimony despite a separation agreement because that agreement contained no provision relating to the maintenance of the wife. Here the wife has expressly renounced her rights to maintenance.

On this second additional argument the provisions of The Deserted Wives' and Children's Maintenance Act, R.S.O. 1937, c. 211, call for consideration. Section 1(2) provides that:

"A married woman shall be deemed to have been deserted within the meaning of this section when she is living apart from her husband because of his acts of cruelty . . . notwithstanding the existence of a separation agreement, providing there has been default thereunder and whether or not the separation agreement contains express provisions excluding the operation of this Act."

Desertion by a husband of his wife carries the necessary implication that against her will she has been forsaken by her husband and left to provide for herself. Here it was because of the conduct of the husband, including his acts of cruelty, that the wife chose to live apart from him, but the fact that they entered into the separation agreement is a bar to proceedings by her against him under the statute. If by the terms of that document he had agreed to maintain her and he had later defaulted, then she could have proceeded against him as having deserted her. That is all that the section means. There is no room for its application where, as here, the wife has by the terms of the agreement renounced her right to maintenance.

I turn now to a consideration of the reasons of the learned trial judge and I consider them in the reverse order from that in which he stated them.

Before the third reason could have any application it would be necessary to conclude that had the husband not been killed and had he and his wife continued to live apart, there would have been a reasonable probability that he would commit adultery. The Court will certainly not reach that conclusion.

The trial judge's second reason is referable to additional pecuniary benefits which, in his opinion, the widow would have received on the death of her husband if his life had been prolonged and which, in his opinion, she has lost by his premature death.

Even on the assumption that the deceased would eventually die intestate, it does not follow that the widow, and indeed the children, have lost by his premature death any amount by which his estate might have been increased. By his premature death the enjoyment of the estate which he had at the date of his death has been accelerated and the value of that accelerated enjoyment must be set off *pro tanto* against the increase, if any, in his estate had his life been prolonged. The extent of the benefit accruing by the accelerated receipt of the estate may fairly to be taken to be represented by the interest which that estate would earn: see *Grand Trunk Railway Company of Canada v. Jennings* (1888), 13 App. Cas. 800, C.R. [9] A.C. 449. If that interest should exceed the increase in the estate then by the deceased's premature death the widow and children have benefited more by the accelerated receipt of the estate than they have lost by the postponement of the receipt of a greater estate: see *Goodwin v. Michigan Central R.R. Co.* (1913), 29 O.L.R. 422, 14 D.L.R. 411.

In any event I think it would be pure speculation to assume that, if the deceased's life had been prolonged, he either would or would not have made a will. Certainly if he made a will, it would be much more likely, in the absence of any reconciliation between himself and his wife, that the children would be his beneficiaries rather than his wife. Moreover if he left a will containing either no provision or inadequate provision for his wife she could not, successfully, invoke The Dependants' Relief Act because s. 9 thereof provides that: "No order shall be made under this Act in favour of a wife who was living apart from

her husband at the time of his death under circumstances which would disentitle her to alimony." Here, the separation agreement would have disentitled her to alimony.

The trial judge's first reason involves a question more of fact than of law. If there was a reasonable probability that, had the husband not been killed, he and his wife, in due course, would have been reconciled, then his untimely death has inflicted pecuniary damage on her, because reconciliation would mean the re-establishment of the home and the revival of legal rights to maintenance which the plaintiff had relinquished by the agreement. The only question of law involved is this, *viz.*, that the prospect of such a reconciliation must be measured by the legal yardstick of reasonable probability as distinguished from mere speculative possibility. Whether the prospect was within the range of reasonable probability is a question of fact to be determined having regard to all the circumstances.

Earlier herein I referred to all that the evidence discloses as to the background against which the separation agreement should be considered. The plaintiff and the deceased had been married 18 years. They had brought four children into the world. Apart from those facts, the evidence discloses nothing with respect to their family life until the period commencing with the months immediately preceding the signing of the agreement. To be confined to evidence thus limited in determining the likelihood of the separation being permanent or only temporary leaves much to be desired.

In this connection the words of McCardie J. in *Barnett v. Cohen et al.*, [1921] 2 K.B. 461, are particularly apt. He said at p. 470: "... I think that the plaintiff must adduce such evidence as affords the judge a reasonable basis on which to infer that pecuniary damage has been inflicted on the plaintiff."

The ages of the parties, the fact that they had been separated only about seven months, the fact that during the separation the husband had returned to the home on occasions to visit the children and bring them gifts, are arguments in favour of possible reconciliation. The reconciliation, however, must go beyond the range of mere possibility. It must have been a reasonable probability.

Decisions in other cases can be of little assistance because of variations in the circumstances.

In *Stimpson v. Wood and Sons* (1888), 59 L.T. 218, the deceased and his wife, the plaintiff, had been living apart for five years, the husband in adultery with another woman and the wife in adultery with another man. Each spouse knew the manner in which the other was living. On occasions the husband would meet the wife, usually in some public place, and give her small gifts. On the husband's death due to negligence by the defendant, the wife brought action under Lord Campbell's Act to recover damages. It was held that the wife had forfeited any legal right to maintenance by her husband and that there was no evidence of any reasonable expectation of her receiving pecuniary advantage from him.

That case is quite distinguishable in its facts from the case at bar.

I have given this case anxious consideration and I have finally reached the conclusion that having regard to all the circumstances the prospect of a reconciliation was more than a mere speculative possibility and came within the range of reasonable probability. In reaching that conclusion I have applied what knowledge I have of human conduct and emotions, and the virtues and vices which this record, sparse as it is, discloses characterized the parties.

The husband was a hard-working, industrious man; his employment record put in at the trial proves that fact. He left an estate consisting of \$3,350 cash and a house which the plaintiff, as administratrix of his estate, sold for \$2,450. In addition there was the home in which the parties had lived together. The title to that property stood in the plaintiff's name. There is the evidence of the witness Wray that over the period from early in 1946 to April 1947 conditions in the home were "not too bad". There is no suggestion that any third party had come between husband and wife. When drunk the husband no doubt had an ugly temper, but I think there is in the evidence enough to warrant the conclusion that the plaintiff was not a shrinking violet. In fits of drunkenness he overpowered her by his greater strength, but I think apart from those occasions she was able to assert herself. Whatever their respective habits and dispositions, over a period of 18 years the parties had accommodated themselves to one another and got along together. Notwithstanding the rift that culminated in the separation agree-

ment, I think that sooner or later they would do so again. The children would be a powerful factor in bringing the parents together again.

Within the field of experience of lawyers and judges in the discharge of their duties which call upon them to investigate and assess human conduct in all its aspects, conduct motivated usually by reason but frequently by emotions, we have, some of us more frequently than others, all seen or learned about homes in which the domestic relations were comparable to the relations which existed in the home of the plaintiff and her husband, and those other homes were not permanently broken up. We have seen married couples, usually those without children, separate, and even enter into formal separation agreements, and later become reunited. When anger subsides and reason asserts itself, and the parties in relative solitude recall earlier years together, they each take stock of the conditions in which they find themselves and their own shortcomings which contributed to the separation and are usually anxious to be reunited. It is certainly abnormal for a married couple who have lived together as long as this couple did, and with children, as this couple had, to separate permanently and irrevocably.

Without saying more, I think it may be reasonably concluded that this separation would not be permanent, and that in due course there would have been a reconciliation and the home would have been re-established.

The separation agreement would not, in any event, be a bar to a claim for damages on behalf of the children. The deceased could not contract himself out of his obligation to support and maintain them.

That brings me to the third argument advanced on this appeal, *viz.*, that the damages as assessed by the learned trial judge are excessive.

The deceased, apparently, had no particular trade. Commencing in August 1941 and continuing until his death he was employed by General Steel Wares Limited, in the city of London. At the time of his death he was earning approximately \$3,000 per year. The separation agreement is not only a factor to be considered in the preliminary question as to whether or not the plaintiff suffered any pecuniary loss, but, that question being answered in the affirmative, it is also a factor to be considered

in determining the quantum of damages. Although a reconciliation between the plaintiff and her husband was reasonably probable, one could only conjecture as to the time when it might be effected. It might be early or it might be late. I should think it might be preceded for some time by payments by the husband to his wife toward her maintenance. All these are factors which make it most difficult to assess her damages. Difficulties in assessment, however, do not bar the plaintiff's right: see *Chaplin v. Hicks*, [1911] 2 K.B. 786.

In *Grand Trunk Railway Company of Canada v. Jennings*, *supra*, Lord Watson said: “. . . the right conferred by statute to recover damages . . . is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others, the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture.”

In *Baker v. Dalgleish Steam Shipping Company*, [1922] 1 K.B. 361, the Court was faced with the difficulty of determining the value of a pension from the Crown to the widow of a naval seaman, which was voluntary in its character and subject to possible discontinuance, and which the Court held had to be taken into consideration as diminishing the pecuniary loss which the widow, were it not for the pension, would have suffered. At p. 381 Younger L.J. says:

“As to future payments they also must be estimated as to their amount even it may be as a matter of conjecture, they being, of course, severely discounted for the following combination of reasons: [which include] (a) because they are voluntary and are under actual risk of withdrawal on personal grounds, (b) because so far as the widow is concerned her pension actually ceases if she becomes unworthy . . .”

There the Court was dealing with the time—which could be only a matter of conjecture—when the receipt of pecuniary benefits would cease; here the question is the time when they would commence.

Although the separation agreement does not press to extinction the pecuniary loss which the plaintiff would otherwise have suffered, it must be regarded as substantially reducing it. To fix the widow's pecuniary loss at the sum of \$5,000 is to mini-

mize unduly the effect of the agreement. I would reduce that amount to the sum of \$3,000 and would vary the judgment below to that extent only. I am not convinced that the amounts awarded to the children are excessive.

Since the appellant sought to avoid all liability, the respondent should have her costs of the appeal.

*Appeal dismissed with costs,
subject to a variation in damages.*

*Solicitors for the plaintiff, respondent: Lerner & Lerner,
London.*

*Solicitors for the defendant, appellant: Thompson, Tooze &
Muir, Toronto.*

[COURT OF APPEAL.]

Rogers and Pyke v. The Township of North York et al.

Municipal Corporations — By-laws — Approval by Ontario Municipal Board—"Essential changes" Directed by Board—Sufficiency of Compliance with Direction—Adoption of Plan—Whether By-law Can be Amended thereafter by Municipality or Board—The Planning Act, 1946, (Ont.), c. 71, s. 13, as re-enacted by 1949, c. 71, s. 5—The Municipal Act, R.S.O. 1937, c. 266, s. 406, as re-enacted by 1941, c. 35, s. 13, and amended.

By-law 2787 of the respondent municipality (passed in 1940) prohibited the use of land within a designated area "except for the purpose of a private detached dwelling-house . . . or for a school or church". The respondent companies acquired 26 acres of land within this area, and proposed to erect thereon a storage warehouse and trucking terminal. After negotiations, the municipal council, on 23rd November 1949, adopted By-law 6474, amending all existing by-laws to permit the use of the 26 acres "for the purpose of a commercial undertaking, and any use similar or accessory to the foregoing". Application was made to the Ontario Municipal Board for approval of By-law 6474, but the Board announced in its decision that it would not approve the by-law unless certain "essential changes", set out at length in the decision, were made. The Board further stated that if the by-law was amended "substantially in accordance" with these requirements it would approve the by-law as amended without further notice or hearing. On the following day the municipal council passed a further by-law, no. 7042, setting out a series of matters in respect of which the respondent companies "have undertaken and agreed with the Corporation". The Board thereupon gave its formal approval to By-law 6474 and By-law 7042.

Held, the order of the Board should be set aside. Its original decision clearly meant that it would not approve the by-law unless such amendments were made as would be effectual to assure compliance by the companies with the requirements set forth in the decision. The so-called "by-law", no. 7042, was not of that character, and accomplished nothing at all, since it was a mere statement that agreements, very briefly and generally described, had been entered into. It might be that the only practical way to ensure due observance of the terms imposed was by agreement rather than by by-law,

but such an agreement would require careful consideration by an experienced draftsman. The property-owners, ratepayers and electors were entitled to something more substantial and effective, and it was a serious mistake in law on the Board's part to accept By-law 7042 as meeting its requirements. The matter should be referred back to the Board so that the "essential changes" required by it might be provided in a way that would secure their due fulfilment by the respondent companies, their successors and assigns.

Held, further, By-law 2787 did not "conform with" an official plan adopted in 1948 under The Planning Act, and consequently was not to be deemed to implement the plan under s. 13 of the Act, as re-enacted in 1949. The existence of the plan therefore did not deprive the municipal council of power to amend the by-law, or the Board of jurisdiction to entertain an application to approve such an amendment.

AN APPEAL from a decision of the Ontario Municipal Board.

20th November 1950. The appeal was heard by ROBERTSON C.J.O. and AYLESWORTH and GIBSON J.J.A.

G. W. Mason, K.C. (R. J. Stanbury, with him), for the appellants: 1. The Board was deprived of jurisdiction by virtue of the provisions of The Planning Act, 1946 (Ont.), c. 71, as amended. The Board purported to exercise authority under The Municipal Act, R.S.O. 1937, c. 266, but the municipality had in 1948 adopted an official plan under The Planning Act, 1946. In this plan certain lands, including those in question in this appeal, were designated as "urban areas". By-law 2787, passed in 1940, prohibited the use of these lands for other than residential purposes, and therefore conforms with the plan and must be deemed, under s. 13, as re-enacted by 1949, c. 71, s. 5, to implement the plan. By-law 6474, passed in 1949, clearly permits a use not contemplated in the plan for "urban areas". The plan contemplates that such an area shall be predominantly residential, but that some enterprises, such as stores and theatres, that will serve the people of the area, may be permitted. The building proposed here is a private enterprise for the benefit of the respondent companies, and is not in any sense a public undertaking. Since By-law 6474 is not in conformity with the official plan it must be taken to be bad, and By-law 7042, like the one it amended, is also bad. Under s. 28a of The Planning Act, enacted by 1947, c. 75, s. 14, the provisions of that Act must prevail, and the Board has no power under that Act to approve a by-law amending a plan on such an application as was here made.

2. Although the Board in its decision set out certain essential changes to be made in the by-law before it could be approved,

By-law 7042 in many respects failed entirely to incorporate those changes, and yet the Board approved it without any further hearing.

3. The Board's decision is invalid because it directed the municipality to include in the by-law matters that are not within the powers of a municipality to enforce.

C. F. H. Carson, K.C. (Alan Van Every, K.C., with him), for the respondent companies: 1. The application was made under s. 406 of The Municipal Act, as re-enacted by 1941, c. 35, s. 13, and amended, and was for approval of a by-law amending an earlier by-law. The Board clearly had jurisdiction under that section, and there is nothing in The Planning Act, 1946, curtailing its authority to hear such an application. By-law 6474 is in conformity with the official plan, the text of which defines "urban areas" only as predominantly residential, not as wholly and exclusively residential, and as including, *inter alia*, "specific and limited public commercial areas". The adjective "public" must be taken grammatically as modifying "areas".

Alternatively, the official plan consists only of a map and explanatory text. By-law 2787 does not form part of the official plan, and therefore By-laws 6474 and 7042 do not constitute an alteration of or addition to the official plan. Since s. 11 of The Planning Act, 1946, applies only to alterations of and additions to an official plan it is not applicable here. The official plan applies to the whole township, while By-law 2787 affects only a small area.

In any case, the question whether By-law 2787 conforms with and implements the official plan is irrelevant to the question of the Board's jurisdiction to hear this application by the Township, although it might be important on an application by a landowner under s. 14(6), as enacted by 1947, c. 75, s. 7.

2. The Board required only that the amendments to By-law 6474 should be "substantially in accordance" with the requirements set out in its decision, and it was for the Board to decide whether or not that condition was fulfilled by By-law 7042. It was evidently satisfied that that by-law was "substantially in accordance" with its requirements, since it would not otherwise have approved the by-laws.

3. The Board did not "direct" the Township to amend By-law 6474, or compel it to do anything. It was satisfied with the

undertakings given by us and recited in By-law 7042, and it was within its power to accept those undertakings and to approve the by-law with them.

C. Frank Moore, K.C., for the Township of North York, respondent, adopted the argument for the respondent companies, and had nothing to add.

G. W. Mason, K.C., in reply.

Cur. adv. vult.

19th January 1951. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from an order of the Ontario Municipal Board, dated 6th October 1950, whereby the Board approved certain by-laws of the respondent Township. Leave to appeal was granted by order of this Court dated 8th November 1950, by which order, however, there were reserved until the hearing of the appeal all objections on the part of the respondents that there was no question of law involved in the appeal, and that this Court had no jurisdiction to hear it.

On the 15th April 1940 the municipal council of the Township of North York passed its By-law 2787, whereby it was provided that no person should thereafter use any land or erect or use any building within that portion of the township described in Schedule "A" thereto, "except for the purpose of a private detached dwelling-house with necessary out-buildings or for a school or church". This by-law was passed in pursuance of s. 406 of The Municipal Act, R.S.O. 1937, c. 266. This section, as re-enacted by 1941, c. 35, s. 13, and subsequently amended, provided that no by-law passed under the section should come into force or be repealed or amended without the approval of the Municipal Board, but that such approval might be given as to the whole or any part of an area or highway affected, if it was shown to the satisfaction of the Board that it was proper and expedient.

The area within the township affected by this by-law is a relatively small part of the township. The respondent companies, or one of them, acquired 26 acres of land located in that part of the township coming within By-law 2787, on which they proposed to erect a storage warehouse and trucking terminal to handle furniture and other heavy merchandise brought in from manufacturers in Toronto, or elsewhere in Ontario, and sold by

“Simpson’s”, for delivery by their local delivery trucks to their retail customers throughout the Toronto district. Negotiations were then had between the respondent companies and township representatives, with a view to the making of amendments to By-law 2787 that would permit of the use of this land for the purposes contemplated by the respondent companies, and on the 23rd November 1949 the municipal council passed its By-law 6474 in the following terms:

“A BY-LAW to permit the use of certain lands described herein for commercial purposes.

“WHEREAS an Application has been made to The Municipal Council of the Township of North York and the Planning Board of the said Township for permission to establish and carry on a commercial undertaking on the lands affected by this By-law.

“NOW THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF NORTH YORK HEREBY ENACTS AS FOLLOWS:

“(1) THAT the lands described as:—

“‘the easterly twenty-six (26) acres of the south-west quarter of Lot 5, Concession 2, west of Yonge Street’

“be and the same are hereby permitted to be used for the purpose of a commercial undertaking, and any use similar or accessory to the foregoing.

“(2) THAT the said lands shall be, and the same are included as ‘Urban Lands’ in the basic Land Use Plan, dated February 17th, 1948, as prepared and recommended by the Planning Board of the Township of North York to be the ‘Official Plan’ for the Township of North York as provided for in The Planning Act, 1946, as Amended.

“(3) THAT all Bylaws in force within the Township of North York be and the same are hereby amended to permit the use of the lands herein described for the establishment and operation of a Commercial Undertaking, and any use similar or accessory to the foregoing, as aforesaid.

“(4) THAT this By-law shall take effect from and after receiving the approval of The Ontario Municipal Board, and the issue of its formal Order herein.

“ENACTED and PASSED this twenty-third day of November, A.D. 1949.”

Application was thereupon made on behalf of the Township to the Municipal Board in pursuance of the provisions of s. 406 of The Municipal Act for its approval of the amending by-law, no. 6474.

The Board heard the application for approval of the by-law on the 13th and 14th April 1950, in the presence of counsel for the applicant and for the respondent companies and for certain interested persons appearing in opposition to the application.

Among the objections put forward on behalf of persons opposing approval of the by-law, it was submitted that the Board had no jurisdiction to entertain the application.

The township council had, on the 17th February 1948, adopted an official plan for the whole township of North York under the provisions of The Planning Act, 1946 (Ont.), c. 71. On the official plan the land now in question, acquired by the respondent companies, is shown as urban land. According to the text accompanying the plan: "Urban areas are areas which are predominantly residential in character; they shall include specific and limited public commercial areas, public recreational areas, selected institutions and public buildings." The total area of the township, as shown by the report of the planning board, is 43,959 acres. A quite substantial part of this area is marked as "urban" on the plan. It may be that the use of the 26 acres in question as a commercial area will not substantially interfere with the urban areas indicated on the plan being "predominantly residential in character".

The objection is taken, however, for the appellants that the Municipal Board has no jurisdiction in the matter. By s. 13 of The Planning Act, 1946, as re-enacted by 1949, c. 71, s. 5, it was provided that: "A by-law that conforms with an official plan shall be deemed to implement the plan whether the by-law is passed before or after the plan." The appellants say that By-law 2787 comes within the description of a by-law that conforms with the official plan and is, therefore, to be deemed to implement the plan notwithstanding that it was passed before the plan. If that contention is sound, there would seem to be no jurisdiction in the council to amend by by-law, or in the Municipal Board to entertain the application to approve such by-law under s. 406 of The Municipal Act. I am, however, of the opinion that By-law 2787 does not conform with the official plan, nor does it imple-

ment that plan. The use of land as an urban area, as designated by the plan, differs materially from the use permitted under the restrictions imposed by By-law 2787, and the plan is not implemented by that earlier by-law. While, therefore, the appeal upon this ground involves a question of law, in my opinion the ruling must be that the objection I have discussed cannot be upheld.

It appears by the written decision of the Municipal Board that it gave weight to some of the objections raised to the approval of By-law 6474, and that the Board had decided that it could not approve By-law 6474, as then framed, but was prepared to grant approval if an amendment was made, providing for certain "essential changes". The essential changes required are given as follows:

"(1) The portion of the property lying east of the proposed Beachmount extension amounting to approximately 6 acres shall remain subject to the present residential restrictions at least until a considered plan of the entire area has been decided upon with the approval of the Department of Planning & Development.

"(2) The words 'commercial undertaking' in the present by-law should be carefully defined so as to include only the type of undertaking actually proposed, or some similar undertaking having no greater injurious effect.

"(3) For the time being and until a detailed official plan and use scheme has been adopted and approved, the project should be served by a completely enclosed and properly screened private right-of-way running southerly from Lawrence Avenue to the north-westerly corner of the project site, to be established and maintained by the company so that all traffic will enter and leave the terminal by way of that street and private right-of-way.

"(4) That the lands to be used for the project shall be entirely enclosed by protective open wire fence together with a planting screen of trees and shrubbery, suitably landscaped on all sides, with all truck loading and unloading taking place within the proposed building.

"(5) That the company will, when required by the Township Council, convey to the Township, free of charge, a strip of land 120 feet in width for the future extension of Beachmount

Avenue, and until such time will not use either the lands included in such strip or the portion of its lands lying east thereof for other than residential purposes as permitted by the present By-law 2787.

“(6) That if and when such northerly extension of Beachmount Avenue is made the company shall have only such access to it as may be in conformity with the lawful regulations of the Township or other competent authority governing the use of such highway for commercial traffic.”

The decision ended as follows:

“If the Township Council considers it advisable to adopt an amendment of By-law 6474, substantially in accordance with these requirements, the Board will grant approval of the by-law so amended without further Notice or hearing.”

This decision was dated 3rd October 1950. On the 4th October 1950 the council passed its By-law 7042, which is as follows:

“A BY-LAW to amend By-law Number 6474.

“NOW THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF NORTH YORK HEREBY ENACTS AS FOLLOWS:—

“1. That section (1) of By-law Number 6474 be amended by adding thereto the following paragraphs lettered —

“(A) The words ‘Commercial Undertaking’ where used in this By-law shall mean and include the erection and operation by Simpsons Limited and The Robert Simpson Company Limited of a warehouse for the storing and conditioning of goods and merchandise handled by the said Companies.

“(B) That the said Simpsons Limited and The Robert Simpson Company Limited, being the owners and occupants of the lands affected by this By-law, have undertaken and agreed with the Corporation as follows:—

“(i) That the said Companies will provide a private right of way west of Woodmount Avenue for the sole and only ingress and egress to the said lands, except as hereinafter provided.

“(ii) That the area of land lying to the east of the proposed northerly extension of Beachmount Avenue may not be used for any commercial or other undertaking by the said companies, or any successor-in-title, except as hereinafter provided.

“(iii) That the lands to be used for the undertaking of the Companies are to be properly screened by trees and landscaped.

“(iv) That the Companies will, when required, convey free of cost to the Corporation a strip of land one hundred and twenty feet (120') in width by six hundred and sixty feet (660') in length for the northerly extension of Beachmount Avenue.

“(v) That the said Companies may have only such access to the aforesaid extension, when the same is completed, as is in conformity with the lawful regulations established by Council, or other competent authority, for controlling the use of such Highway.

“2. THAT in all other respects the said By-law Number 6474 be, and the same is hereby confirmed.

“3. THAT this By-law shall take effect from and after receiving the approval of The Ontario Municipal Board, and the issue of its formal Order herein.

“ENACTED AND PASSED this 4th day of October, A.D. 1950.”

The Board thereupon, on being furnished with this amending by-law, issued its formal order approving By-law 6474 and By-law 7042, no further notice of hearing being given. Later, considering that this formal order of approval, which was dated 3rd October, was improperly dated as of that date, having in fact been made on the 6th October, the Board, on the 31st October, made its further order changing the date of the order to the 6th October 1950.

Plainly, the Board had reached the conclusion, and announced it in its decision, that it would not approve By-law 6474 as framed. Certain “essential changes” would first be necessary, and it said what they were. It was in these circumstances that the Board dispensed with further notice or hearing. The Board would “grant approval of the by-law so amended” and the amendments were to be “substantially in accordance” with the requirements detailed in the Board’s decision.

This surely meant that the amendments were to be such as would be effectual to assure compliance by the respondent companies with the requirements set forth at length in the decision. Yet the amending by-law, no. 7042, is not at all of that character. It may be that the only practical way in which the matter can be put in a position where due observance by the respondent companies of the terms imposed can be assured is by agreement and not by by-law at all, but such an agreement, to be effective for the purpose, would require much careful consideration by an

experienced draftsman. To pass By-law 7042 accomplishes nothing at all. It is a mere statement that certain agreements, very briefly and generally described, have been entered into by the respondent companies. I know of no authority in a municipal council to pass the so-called "by-law". It is not a by-law, or any other kind of law, and except for the title given it, does not purport to be a by-law, but only a series of assertions of what the members of the council believe to be facts.

The property-owners affected, as well as the ratepayers and electors of the township, were entitled, for the protection of their several interests in this matter, to something more substantial and effective than this so-called "by-law". It was a serious mistake in law on the part of the Board to accept this By-law 7042 as meeting its requirements.

In my opinion the proper course to be taken on this appeal is to set aside the Board's order of approval, and to refer the matter back to the Board so that the "essential changes" stated in the Board's decision may be provided in a proper way that is likely to prove effective in securing their due fulfilment and observance by the respondent companies, their successors and assigns.

The appellants should have the costs of the appeal and of the motion for leave to appeal.

Appeal allowed with costs.

Solicitors for the appellants: Aylesworth, Garden, Thompson & Stanbury, Toronto.

Solicitor for the Township of North York, respondent: C. Frank Moore, Toronto.

Solicitor for the respondent companies: Alan Van Every, Toronto.

[COURT OF APPEAL.]

Gray Coach Lines Limited v. Canadian Pacific Railway Company.

Railways—Duty to Fence, etc.—Escape of Animal on to Right-of-Way—Consequent Damage to Third Person—Whether Railway Liable — The Railway Act, R.S.C. 1927, c. 170, ss. 274, 385, 386.

The obligation of a railway to erect and maintain fences along its right-of-way is imposed by s. 274 of The Railway Act for the benefit of adjoining landowners and their privies, and not for the benefit of the public generally. The liability created by s. 385 is correlative to this obligation, and consequently there is no cause of action if an animal escapes on to the right-of-way and then wanders and causes damage to a third person, even if the escape has been the result of a breach by the railway of its statutory obligation to maintain the fences. Negligence can only be a breach of a duty owing to a particular person, and the railway owes no duty in this respect towards any person other than the adjoining landowners and their privies. *The Grand Trunk Railway Company of Canada v. James* (1901), 31 S.C.R. 420; *Winterburn v. Edmonton, Yukon and Pacific Railway Company* (1908), 1 Alta. L.R. 92, 298; *Hunt v. Grand Trunk Pacific Railway Co.* (1909), 18 Man. R. 603; *Davidson v. The Grand Trunk Railway Company* (1903), 5 O.L.R. 574; *Walker v. Grand Trunk R.W. Co.* (1920), 47 O.L.R. 439, considered.

Statutes—Breach of Statutory Duty—When Cause of Action Exists in Person Injured by Breach—For Whose Benefit Duty Imposed.

An omission to perform a duty imposed by statute does not give rise to a right of action in favour of a person suffering damage by reason of the omission unless such right is expressly or impliedly given by the statute. It is only persons for whose benefit the statutory obligation was imposed who can avail themselves of the breach of duty, and where the person injured is not one of the class contemplated by the legislature then, although the act or omission complained of may be a breach of the statute, the person injured cannot rely upon that breach. *O'Brien v. Enrico Arbib & Company*, [1907] S.C. 975, applied; 23 Halsbury, 2nd ed., para. 923, quoted with approval.

AN APPEAL by the plaintiff from the judgment of Barlow J., [1950] O.W.N. 441, dismissing the action.

7th November 1950. The appeal was heard by ROBERTSON C.J.O. and ROACH and MACKAY JJ.A.

Irving S. Fairty, K.C., for the plaintiff, appellant: There is no dispute as to the facts, and the appeal is solely on the law. The trial judge erred in law in respect of all three grounds on which he dismissed the action, *viz.*: (a) that the evidence did not establish a "direct causal connection"; (b) that the damages were too remote; and (c) that the statute disobeyed by the defendant gave no remedy at law to the plaintiff. I deal with these matters in order:

(a) On the evidence, there is an obvious case of cause and effect. That the horse, after escaping through the neglected fence, wandered to the highway, where it collided with the bus,

is more than a reasonable assumption; it is an irresistible inference. Our damage consequently followed directly from the defendant's failure to obey the provisions of the statute as to fencing. It is both the right and the duty of a Court to draw inferences: *Canadian Pacific Railway Company v. Murray*, [1932] S.C.R. 112, 38 C.R.C. 298, [1932] 2 D.L.R. 806; *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39.

(b) The damage resulting from the breach of the statute was both probable and foreseeable. The injury to us was the natural and probable result of the defendant's negligence. Although it has been criticized, *In re Polemis et al. and Furness, Withy and Company, Limited*, [1921] 3 K.B. 560, is still good law, in spite of cases such as *Hay or Bourhill v. Young*, [1943] A.C. 92, [1942] 2 All E.R. 396. Even accepting the doctrine of "foreseeable risk", however, what more likely result could be imagined than what happened here? The result was more than a possibility; it was a probability: *McMillan v. Wallace*, 64 O.L.R. 4, [1929] 3 D.L.R. 367; *Davidson v. The Grand Trunk Railway Company* (1903), 5 O.L.R. 574, 2 C.R.C. 371; *Kirk v. Milligan*, [1948] O.W.N. 609.

(c) The defendant is liable for the consequences of its admitted breach of statutory duty. We rest our case on subss. 1 and 3 of s. 274, and s. 385, of The Railway Act, R.S.C. 1927, c. 170. Section 386, to which the trial judge referred on this branch of the case, is not applicable. The general law as to liability is stated in *Winterburn v. Edmonton, Yukon and Pacific Railway Company* (1908), 1 Alta. L.R. 92, 298, 9 C.R.C. 1, 7, 8 W.L.R. 815; *Schubert v. Sterling Trusts Corporation et al.* [1943] O.R. 438, [1943] 4 D.L.R. 584. Here the onus is on the defendant to show by the plain words of the statute that the plaintiff has no remedy. The wording of s. 385 is explicit. The Court should not speculate as to the motives or objects of Parliament in enacting a statute, and should attempt to define such motives or objects only in cases where they are obviously apparent, as in *Gorris et al. v. Scott* (1874), L.R. 9 Ex. 125. Important changes were made in the statute in 1903 and 1910. *Hunt v. Grand Trunk Pacific Railway Co.* (1909), 18 Man. R. 603, 9 C.R.C. 365, 10 W.L.R. 581, the only authority cited by the trial judge that can be considered against us, is no longer applicable to the statute as it now stands, and is contrary to

the law as laid down by appellate Courts in Ontario and Alberta. The present legislation is wider than that in force before 1910, and certainly wider than that in force before 1903. Even before 1903, however, the decisions are favourable to our position. In *James v. The Grand Trunk Railway Company* (1900), 31 O.R. 672, 1 C.R.C. 407, affirmed 1 O.L.R. 127, 1 C.R.C. 409, it was held that a failure to fence imported liability to a person damaged by such failure. This judgment was reversed, *sub nom. The Grand Trunk Railway Company of Canada v. James* (1901), 31 S.C.R. 420, 1 C.R.C. 422, but on grounds which, as pointed out in *Davidson v. The Grand Trunk Railway Company, supra*, did not touch the question of liability where a breach of a statutory duty had been committed. Section 274(3) should be read literally. It is simply a description of the type of fence that will comply with the requirements of Parliament. Failure to meet these requirements results in the obligation imposed by s. 385. The two sections must be read together in interpreting either of them. Section 386 deals with damage to or by animals which have got on railway lands, and imposes liability on the railway except in specified instances. In cases, like the present, where s. 386 is inapplicable there is no conflict in the legislation, and no reason to imply any restriction on the language of s. 385 or on the railway's liability for a breach of statutory duty.

As to the damages, we should be allowed the full amount claimed, including that for loss of the use of the coach.

F. H. Britton, for the defendant, respondent: I deal with the appellant's points in the reverse order:

(c) Sections 274 and 385 are not interdependent. Section 385 is a general section, imposing liability on a railway for any breach of the statute, and is followed by sections dealing with particular breaches. On the plain reading of the statute, s. 274 is clearly complemented by s. 386. Section 274 is not merely descriptive of the fences to be erected and maintained by a railway, but imposes a duty on it to build fences sufficient to prevent cattle and other animals from getting on to railway lands; s. 386 imposes liability on the railway when animals do get on to its lands and are damaged or cause damage. At common law there is no obligation on us to fence our property. Parliament intended to abrogate the common law only to the extent of making a railway company liable for damage to or by cattle that escaped

on to its lands: *Hunt v. Grand Trunk Pacific Railway Co.*, *supra*; *McDonnell v. Canadian Pacific Railway Company* (1920), 29 C.R.C. 169. Section 385 is merely a statement of the common law, and imposes no additional liability where liability is specifically dealt with elsewhere in the statute: *Clayton v. Canadian Northern Railway* (1908), 17 Man. R. 426, 7 C.R.C. 355, 7 W.L.R. 721.

(b) The damages are too remote. We are under no higher duty to users of a highway than is any other landowner, in the absence of express language in the statute. There is no duty at common law on the owner of a domestic animal to prevent it from straying on to the highway: *Deen v. Davies*, [1935] 2 K.B. 282. There are several Ontario statutes that prohibit owners from allowing animals to stray, but we were not the owner of this horse, and in any event the railway is a creature of the Dominion Parliament, and is not subject to municipal by-laws.

(a) It was the plaintiff's duty to establish a causal connection, and the trial judge was right in holding that it had not done so.

If the plaintiff does recover, its damages should be fixed at no greater amount than the cost of repairs. There is no evidence to justify an award of damages for loss of the use of the coach.

Irving S. Fairty, K.C., in reply: I concede that if ss. 274 and 386 are read together, and are referred to exclusively, the defendant is not liable. But s. 386 has nothing to do with this case. It was s. 385 that we pleaded. Under s. 274 the railway is required to erect and maintain fences, and here it clearly failed to maintain them. I concede the principle of *Gorris et al. v. Scott*, *supra*, in a proper case, but this is not such a case.

Cur. adv. vult.

24th January 1951. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the plaintiff from the judgment of Barlow J. dated the 28th April 1950, dismissing the action with costs.

The action was brought to recover damages caused to the plaintiff's bus as a result of its collision with a horse on highway no. 10 in the township of Toronto in the county of Peel on the 22nd October 1948.

Highway no. 10 runs northerly from the town of Cooksville. The defendant railway's right-of-way runs easterly and westerly and crosses highway no. 10 a short distance north of Cooksville.

This particular horse and others had been pasturing in a field on the south side of and adjoining the defendant's right-of-way and about three-quarters of a mile west of the railway crossing on highway no. 10. The collision occurred about half a mile north of the crossing.

The plaintiff's claim was based on an allegation of negligence consisting in the failure of the defendant to erect and maintain suitable fences along its right-of-way bordering on the pasture field and that as a result the horse escaped from the field and on to the railway right-of-way and thence to the highway.

The plaintiff pleaded The Railway Act, R.S.C. 1927, c. 170, and amendments thereto, and particularly ss. 274 and 385.

The defendant denied the alleged negligence and pleaded further: (a) that the alleged acts of negligence did not in any event cause or contribute to cause the collision; (b) that they did not constitute negligence in law; (c) that the damage was too remote; (d) that the collision was caused by the negligent operation of the motor bus.

The learned trial judge exonerated the driver of the motor bus from negligence. He found as a fact that a portion of the fence in question was in a poor state of repair and that this horse and two others had escaped through that portion and on to the defendant's right-of-way; one of them was killed on that right-of-way and the third found its way to the farmer's barn. He declined to find on the evidence that this particular horse had reached the highway by way of the defendant's right-of-way or that there was any causal connection between the defective fence and the collision. He held further that certain sections of The Railway Act, with which he dealt, and to which I shall refer, regarding fencing had no application to the circumstances of this case, and that even if it could be held that they had, the damages were too remote.

I should say at the outset that in my opinion, as a matter of reasonable inference from the proved facts, it should be concluded that this horse, after escaping from the pasture field on to the railway right-of-way, did in fact wander down the railway track to highway no. 10 and thence north to the point at which the accident occurred.

The relevant sections of The Railway Act are as follows:

"274. The company shall erect and maintain upon the railway

"(a) fences of a minimum height of four feet six inches on each side of the railway;

"(b) swing gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings; and

"(c) cattle-guards, on each side of the highway, at every highway crossing at rail level with the railway.

"(2) The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway.

"(3) Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway lands.

"(4) The Board may, upon application made to it by the company, relieve the company, temporarily or otherwise, from erecting and maintaining such fences, gates and cattle-guards where the railway passes through any locality in which, in the opinion of the Board, such works and structures are unnecessary.

"(5) Where the railway is being constructed through enclosed lands, the company shall, by fencing its right of way before any existing fences are taken down or by other effective means, prevent cattle or other animals escaping from or getting upon such enclosed lands or from one enclosure to another or upon the property of the company by reason of such construction or of any act or thing done by the company, its contractors, agents or employees."

"385. Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor in Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of

damages sustained thereby, and such damages shall not be subject to any special limitation except as expressly provided for by this or any other Act."

"386. When any horses, sheep, swine or other cattle, whether at large or not, get upon the lands of the company and by reason thereof damage is caused to or by such animal, the person suffering such damage shall be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction unless the company establishes that such damage was caused by reason of. . . ." (Then follow the descriptions of acts or omissions sufficient to exonerate the company, which I refrain from here quoting because they have no application.)

The learned trial judge in his reasons referred to ss. 274 and 386 but not to s. 385. He held that s. 386 rendered the company liable for damages "to or by such animal" only while on the railway lands. In my opinion he was correct in so holding and s. 386 plainly has no application to the facts of this case. On this appeal counsel for the appellant agreed that it had no application but did insist that s. 385 directly applied.

The duty created by s. 274 to erect and maintain fences is for the benefit of those entitled to use the adjoining lands. The extent of the benefit in their favour thereby created has been the subject of cases to which I shall hereinafter refer, because they were relied upon by counsel for the appellant. The liability created by s. 385, notwithstanding its very general language, is a liability limited to those in whose favour the duty is created and is not carried further by that section.

The history of the legislation and Court decisions interpreting it over the years make plain the purpose of the duty and the extent of the liability for breach of that duty. Moreover, in my opinion, even without any reference to that history or those decisions the purpose of the duty and the extent of the liability can be readily ascertained by looking at the Act itself as it stands today.

In reviewing that history, it will suffice to commence with The Railway Act of 1888, 51 Vict., c. 29.

Section 194 of the Act of 1888, omitting the parts not in point in this historical review, is as follows:

"When a municipal corporation for any township has been organized and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle-guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway; Provided always that in New Brunswick, Nova Scotia and Prince Edward Island, wherever a county municipality has not been subdivided into local municipalities, each improved or occupied lot of land shall be protected by fences, gates and cattle-guards, as in this section provided: . . .

"(3) Until such fences and cattle-guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals, not wrongfully on the railway, and having got there in consequence of the omission to make, complete and maintain such fences and cattle-guards as aforesaid."

Section 289 of the Act of 1888 reads as follows:

"Every company, director or officer doing, causing or permitting to be done, any matter, act or thing contrary to the provisions of this or the special Act, or to the orders or directions of the Governor in Council, or of the Railway Committee or Minister made hereunder, or omitting to do any matter, act or thing required to be done on the part of any such company, director or officer, is liable to any person injured thereby for the full amount of damages sustained by such act or omission . . ."

In 1890, by 53 Vict., c. 28, s. 2, s. 194(3) of the Act of 1888 was repealed and the following substituted therefor:

"If the company omits to erect and complete as aforesaid any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by

any of the company's trains or engines; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

In *The Grand Trunk Railway Company of Canada v. James* (1901), 31 S.C.R. 420, 1 C.R.C. 422, the Supreme Court of Canada considered the effect and purpose of s. 194. At p. 431 (S.C.R.) Sedgewick J. said:

"Its object seems to me clear and express, namely, the securing of protection for adjoining proprietors . . .

"Again, in the proviso at the end of sub-section one of section 194, there is an indication that the object is to protect, not the railway, but the owners of improved and occupied lands on each side of it. So long as such protection is afforded by a fence of the prescribed character there is no liability. . . .

"Subsection three strongly indicates the same motive. The only penalty for breach of the requirements in regard to fences and cattle guards is that in the event of the company's neglect, the company shall be liable to the owner, not for all damage which may happen to him or to his property, but only for the damage which he may suffer on account of animals killed or injured or by the company's trains or engines."

The Railway Act, 1903, 3 Edw. VII, c. 58, amended and consolidated the law respecting railways. Section 199 was the section creating the duty to erect and maintain fences, gates and cattle-guards and, subject to some variation in the wording, was substantially the same, at least for the purpose of the point I am making in this review, as the present s. 274, omitting subs. 5 thereof.

Section 289 of the Act of 1888 became s. 294 of the Act of 1903 with some difference in wording not material in this review.

In R.S.C. 1906, c. 37, the fencing section appears as s. 254 in substantially the same wording as s. 199 of the Act of 1903, and s. 294 of the 1903 Act, with some variation in the wording, appears as s. 427(1) and (2).

Pausing for a moment to compare the fencing section of the Act of 1888 (s. 194) as amended in 1890, with the fencing section in the revised statutes of 1906 (s. 254) it will be observed that whereas s. 194 describes the liability for failure to maintain

adequate fencing as being a liability "for all damages done by its trains and engines", etc., s. 254 makes no reference to liability.

Under The Railway Act, R.S.C. 1906, c. 37, two cases came before the Courts and resulted in conflicting decisions. I refer to them, not because in my opinion either of them has any special application to the facts in the case at bar, but because they were referred to by counsel during the argument.

In Alberta in the case of *Winterburn v. Edmonton, Yukon and Pacific Railway Company* (1908), 1 Alta. L.R. 92, 298, 9 C.R.C. 1, 7, 8 W.L.R. 815, it was held that the fences required to be erected under s. 254 are for all purposes which they may serve, and by virtue of s. 427 the railway company was liable for all damage of whatever kind resulting from the omission to fence. In that case the plaintiffs were owners of lands adjoining the railway lands. The fences along the highway at the crossing of the railway had been torn down during the construction of the railway and no fences had been erected along the right-of-way. Cattle had got on to the railway lands and thence to the plaintiffs' lands and caused damage to crops and stacks of hay and grain. The plaintiffs recovered for the damage thus caused, the trial judge, Harvey J. (as he then was), and the Court of Appeal being of the opinion that the omission of the special limitation contained in s. 194(3) of the Act of 1888 as amended in 1890 from s. 254 of the Act of 1906 extended application of the liability section, namely, s. 427(1) and (2), as a result of which the company would be liable in cases of inadequate fencing not only to the occupant of adjoining lands whose cattle escaped from his lands on to the railway lands and were killed or injured, but also to the occupant of other adjoining lands for cattle which escaped from the railway lands on to those other lands and caused damage thereon.

In Manitoba in the following year in the case of *Hunt v. Grand Trunk Pacific Railway Co.* (1909), 18 Man. R. 603, 9 C.R.C. 365, 10 W.L.R. 581, it was held by the Court of Appeal, Richards J. A. dissenting, that the duty to fence prescribed by s. 254 did not bind the company to fence its right-of-way but only to put up such fences as were required to protect the track from cattle and accordingly if, as a consequence of the failure of the company to erect such fences, cattle or other animals got upon the tracks and were killed or injured the company would

be liable but, notwithstanding the general language of s. 427, it was not liable for damage caused to an adjoining owner by cattle straying from the right-of-way on to his lands in consequence of the absence of adequate fencing.

By 1910, c. 50, s. 5, Parliament amended s. 254(3) by adding the word "lands" at the end thereof.

Counsel for the appellant in the case at bar pressed upon us the argument that the decision in the *Winterburn* case was right and the decision in the *Hunt* case wrong and that in any event as a result of the amendment in 1910 an adjoining owner who suffers damage by cattle or horses straying on to his lands from the railway lands in consequence of the absence of proper fences is entitled to recover from the company as did the plaintiffs in the *Winterburn* case. The next step in his argument was this, that if such an adjoining owner could recover from the company, so should any other person who suffers damage by reason of the animals wandering off the railway tracks, and, specifically, that the appellant in this case was entitled to recover.

It is not necessary for this Court to express its opinion as to the correctness of the decision either in the *Winterburn* case or in the *Hunt* case, and I expressly refrain from doing so. However, on the assumption that the decision in the *Winterburn* case was correct it does not follow that the damages suffered by the appellant in the case at bar are recoverable against the company. The appellant in this case stood in quite a different position in relation to the company than did the plaintiffs in the *Winterburn* case.

To continue with the history of the legislation, s. 254 of the 1906 Act became s. 274 of 1919, c. 68, and the present Act, and s. 427 of the 1906 Act became s. 385.

The defendant company omitted to perform the statutory duty imposed upon it of adequately maintaining the fence between its right-of-way and the pasture field. However, the omission to perform a statutory duty does not give rise to a right of action in favour of a person suffering damage by reason of such omission unless such right is expressly or impliedly given by statute: 23 Halsbury, 2nd ed. 1936, p. 651, para. 918.

It becomes necessary, therefore, to determine the extent of the right of action created by s. 385. In doing so it is of first

importance to determine the persons for whose benefit the statutory obligation to fence is imposed. That obligation is and, as the history of the legislation plainly shows, has always been, an obligation existing only in favour of adjoining landowners and those in privity with them. In other words, it is an obligation for the purpose of protecting adjoining landowners and those in privity with them, and was not designed for the protection of the public generally.

Where the person injured is not one of the class in contemplation by the legislature, although the act or omission complained of may be a breach of the statute, the person injured cannot rely upon that breach: *O'Brien v. Enrico Arbib & Company*, [1907] S.C. 975.

This principle is stated in 23 Halsbury, p. 653, para. 923: "Where the statute aims at the protection of a particular class, or at the attainment of a particular purpose, which in the ordinary course is calculated to benefit a particular individual or member of a class, an individual injured by a neglect of the obligation, either as one of that class, or by reason of being affected by the failure to attain that particular purpose, may have his remedy although a penalty is imposed by the statute." In my opinion the right of action created by s. 385 is no greater than the remedy referred to in that passage in Halsbury.

For the foregoing reasons the decision in the *Winterburn* case has no application, and also the decision in *Davidson v. The Grand Trunk Railway Company* (1903), 5 O.L.R. 574, 2 C.R.C. 371, also relied upon by counsel for the appellant, likewise has no application.

The plaintiff's action is founded on negligence. Negligence is the breach of a duty owing to someone, and there was no duty within the circumstances of this case owing by the defendant to the plaintiff. If authorities are needed for that proposition, they have been cited by Riddell J. (as he then was) in *Walker v. Grand Trunk R.W. Co.* (1920), 47 O.L.R. 439 at 450, 26 C.R.C. 357, 53 D.L.R. 595, where he said:

"Of course, there is no such thing as negligence at large—negligence must necessarily be a breach of duty toward someone. The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negli-

gence:' *per* Lord Esher, M.R. in *Le Lievre v. Gould*, [1893] 1 Q.B. 491, at p. 497."

For the foregoing reasons this appeal must fail and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: Irving S. Fairty, Toronto.

Solicitor for the defendant, respondent: F. D. Turville, Toronto.

* [SCHROEDER J.]

**Composers, Authors and Publishers Association of Canada, Limited
v. Associated Broadcasting Company Limited et al.**

Copyright—Infringement—Exemptions—Public Performance by Means of Gramophone—Records Played in Central Control-room and Reproduced in Other Buildings at Distance—The Copyright Act, R.S.C. 1927, c. 32, s. 10B(6)(a), as enacted by 1938, c. 27, s. 4.

The defendant company supplied music to its customers by means of records played in a central control-room of the company, whence the impulses were transmitted by wires to the premises of the customers and reproduced there by means of amplifiers and loud-speakers installed in the premises.

Held, notwithstanding the separation of the instrumentalities by which the performance was effected, the performance of this music was a "performance by means of . . . [a] gramophone", within the meaning of s. 10B(6)(a) of The Copyright Act, as enacted in 1938, and, since the performance was not in a theatre, no fees, charges or royalties were payable to the holders of copyright or playing rights in any of the music so performed. The fact that the performance was for profit was immaterial.

AN ACTION for an injunction and other relief.

8th to 12th and 15th to 17th January 1951. The action was tried by SCHROEDER J. without a jury at Toronto.

H. E. Manning, K.C., and *D. W. Faulkner*, for the plaintiff.

H. G. Fox, K.C., and *R. H. Sankey, K.C.*, for the defendants.

29th January 1951. SCHROEDER J.:—The plaintiff is a company which carries on in Canada the business of acquiring copyrights of musical works or the performing rights therein, and which deals with or in the issue or grant of licences for the performance in Canada of such works in which copyright subsists. It is, accordingly, affected and bound by the provisions of The Copyright Act, R.S.C. 1927, c. 32, as amended by 1931, c. 8; 1935, c. 18; 1936, c. 28; and 1938, c. 27, and more particularly

by the provisions of ss. 10, 10A and 10B as the same appear in the office consolidation of The Copyright Act under the caption "Performing Rights Societies".

As owner in the year 1949 of the performing rights in the copyrighted musical works entitled "Moon Glow", "Sophisticated Lady", "April Showers", "Ol' Man River", "Who", and "Make Believe", the plaintiff alleges that the defendant Associated Broadcasting Company Limited, hereinafter referred to as "the A.B.C. Company", the defendant H. Reibstein as owner and operator of a tavern or cocktail bar known as the Famous Door Tavern, the defendant Beecher Dennis as owner and operator of a similar establishment known as the Brass Rail, and Westminster Hotel Limited as the owner and proprietor of a place of entertainment of like nature, all carrying on business in the city of Toronto, did on the 8th and 9th April 1949 infringe the plaintiff's said copyrights by performing or causing to be performed in public, over loud-speakers installed in the premises of the defendants other than the A.B.C. Company, the musical works hereinbefore mentioned, or some of them, without the consent of the plaintiff, or that they authorized such performance without the plaintiff's consent.

The circumstances in which the alleged infringement is said to have taken place were as follows: The A.B.C. Company carries on a business in the city of Toronto which involves the furnishing of musical programmes to its three co-defendants and 187 other subscribers in Toronto, pursuant to written contracts entered into with its patrons, which provide for payment of a stipulated monthly fee for such services. In connection with its operations it maintains a central control-room in down-town Toronto in which has been installed a mechanical contrivance which is or resembles in all its essential characteristics, although on a larger and more elaborate scale, an electric phonograph or gramophone. This apparatus will be described in greater detail later, but for the present purpose it is sufficient to say that it consists in part of four turntables which are capable of playing records or electrical transcriptions, and by means of switching devices any one of the four turntables can be quickly brought into operation.

Under an agreement with the Bell Telephone Company the A.B.C. Company has the right to use the wiring system of the

telephone company for the purpose of conducting electrical impulses originating in its control-room to the premises of its various customers, where, by means of an amplifier and a series of loud-speakers, the mechanical vibrations originating in the control-room at the point of contact of the needle with the sinuous groove in the record revolving upon the particular turntable then in use are converted into sound. Thus the patrons of the establishments conducted by the defendants other than the A.B.C. Company can enjoy a combination of liquid refreshment and music consisting either of the immortal classics of the grand old masters of the past or the productions of a more recent period dignified by such titles as "Sophisticated Lady" or "You Ain't Heard Nothing yet".

No question is raised in this action as to the plaintiff's ownership of that portion of the copyright in each of the said musical works which is claimed by it. It has been established that the plaintiff did not consent to the use of the said musical works and that none of the defendants has paid any fees, charges or royalties to the plaintiff for such purpose. There is no dispute as to the manner in which the alleged infringements occurred or as to the date, places and times of their performance or the authorization of such performances by the defendants.

The plaintiff claims:

"(i). A declaration that it is the owner of that part of the copyright in the said musical works "MOON GLOW", "SOPHISTICATED LADY", "APRIL SHOWERS", "OL' MAN RIVER", "WHO" and "MAKE BELIEVE" which consists of the sole right to perform the same in public throughout the Dominion of Canada.

"(ii). A declaration that the Defendants and each of them have infringed the Plaintiff's said copyright in the said musical works as hereinbefore set forth by the performance thereof or by authorizing the performance thereof in public without the consent of the Plaintiff for the private profit of the said Defendants and each of them.

"(iii). An injunction restraining the said Defendants, their and each of their agents, servants and employees from infringing the Plaintiff's copyright in the said musical works "MOON GLOW", "SOPHISTICATED LADY", "APRIL SHOWERS", "OL' MAN RIVER", "WHO" and "MAKE BELIEVE" by the performance of the same or any substantial part thereof in public by means of the said device without the consent of the Plaintiff.

“(iv). . . . damages.

“(v). Such part of the profits which the Defendants have severally made as this Honourable Court may decide to be just and proper.”

They also ask for a direction that the necessary accounts be taken and enquiries had, together with such further and such other relief as the nature of the case may require.

The defendants plead that “The equipment owned or used by the defendants in the acoustic reproduction of recorded sound vibrations is a gramophone within the meaning of subsection (6) (a) of section 10B of the Copyright Amendment Act, 1931, being chapter 8 of the Statutes of Canada, 1931, as amended, and therefore there has been no infringement of copyright by the defendants or any of them by reason of the public performance of musical works in Canada by means of such equipment.”

If this plea should not be sustained, then clearly the defendants other than the A.B.C. Company have infringed the plaintiff's copyright in question herein by performing one or more of the said musical works in public and the A.B.C. Company has authorized such performances.

I deem it unnecessary, therefore, to discuss the provisions of The Copyright Act bearing upon this particular phase of the case at bar. The sole question which presents itself for determination is whether or not the defendants have brought themselves within the terms of s. 10B(6) (a) of the statute, as enacted by 1938, c. 27, s. 4, which reads:

“In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.”

In the earlier stages of the trial the plaintiff's counsel endeavoured to draw a distinction between a gramophone and a phonograph, contending that the former was an instrument which employed purely mechanical means of acoustic reproduction, while the latter made use of electrical or electronic devices, although both performed the same function. Later, however, and quite properly, this contention was withdrawn and counsel conceded that the terms "gramophone" and "phonograph" could be used interchangeably.

It is stated by high authority that there can be no doubt that reference may properly be made to dictionaries to ascertain not only the meaning of a word but also the use to which the thing (if it be a thing) denoted by the word is commonly put: *Coca-Cola Company of Canada, Limited v. Pepsi-Cola Company of Canada, Limited*, [1942] 1 All E.R. 615 at 617, 2 Fox Pat. C. 143, 1 C.P.R. 293, [1942] 2 D.L.R. 657, [1942] 2 W.W.R. 257.

In the Shorter Oxford Dictionary, 2nd ed. 1936, the word "gramophone" is defined as: "An instrument for recording and reproducing vocal, instrumental and other sounds; *esp.* a reproducing instrument consisting essentially of a revolving turn-table capable of carrying disks on which are impressed, in a spiral track, wave-forms corresp. to sound vibrations, to reproduce which a stylus, attached to an acoustic device or electric system, travels along the track." It is suggested that the word was apparently formed by an inversion of "phonogram".

The Encyclopædia Britannica, 14th ed., vol. 10, at p. 616, contains the following definition of "gramophone": "An instrument for reproducing sound . . . by transmitting to the air the mechanical vibrations of a stylus in contact with a sinuous groove in a moving record. In a wider sense the term might be applied to any instrument for the recording or subsequent reproduction of sound."

In vol. 17 of the Encyclopædia Britannica, at p. 776, the word "phonograph" is defined in almost identical terms. It is interesting to note that Edison described his invention, which was patented in the year 1878, as a "phonograph", while Berliner referred to his improved model of this invention, which was patented in the year 1887, as a "gramophone". At still another stage the name "graphophone" was introduced. More recently, when phonographs and radios were combined the instrument was

described as a radio-phonograph combination. The same combination is called a "radiogram" in England. Another development was the record-player which had all the component parts of a phonograph except the loud-speaker. It was and is possible to make a connection with the loud-speaker of a radio by means of wires running from the playing head of the record-player, and when so connected the two machines combine all the elements of a phonograph or gramophone. For an extended discussion of the history and origin of these various words, reference may be made to the judgment of Parker J. in *In re Gramophone Company's Application*, [1910] 2 Ch. 428, 27 R.P.C. 689, and particular reference is made to p. 690 of the latter report. Parker J. declined to register the word "gramophone" as a trade mark and his judgment was sustained on appeal.

Efforts were made by some of the witnesses to suggest that the species of records played on the A.B.C. Company's turntables were not gramophone or phonograph records in the ordinary sense but were known in the trade as electrical transcriptions. When all the evidence on this point is carefully sifted, it appears that the only essential difference between an electrical transcription and a record sold for domestic use is that the former is 16 inches in diameter and the latter 10 or 12 inches. Modern domestic record-players or phonographs have turntables which revolve at three speeds, namely, $33\frac{1}{3}$, 45 or 78 revolutions per minute, each of which may be selected by operating a control lever. The turntables employed by the A.B.C. Company in its operations revolve at two controllable speeds, $33\frac{1}{3}$ revolutions per minute or 78 revolutions per minute. Electrical transcriptions can be played on the ordinary modern phonograph provided that the turntable is of the proper dimensions to take a 16-inch disk and any domestic record can be played on the transcription turntables of the A.B.C. Company. In the trade, turntables such as those installed in the A.B.C. Company's control-room are distinguished by the name of "transcription turntables". In my view, however, nothing turns on the use of labels which are attached to the various types of instruments or records with which we are concerned in the case at bar.

The plaintiff's witness William Thornton Charles Dowding, a recording engineer employed by the R.C.A. Victor Company, was asked on cross-examination to compare the earlier type of gramophone, the spindle of which was revolved by a clockwork

type of motor, and which employed purely mechanical means of sound reproduction, with the improved type of instrument which utilized electrical aids, and his testimony on this point may be summarized as follows:

(1) The earlier invention had a spindle which was operated by a clockwork type of motor, whereas the later model was equipped with an electric motor which turned the spindle.

(2) Both instruments had a flat round turntable which was connected with the spindle and a flat record could be placed on each of them.

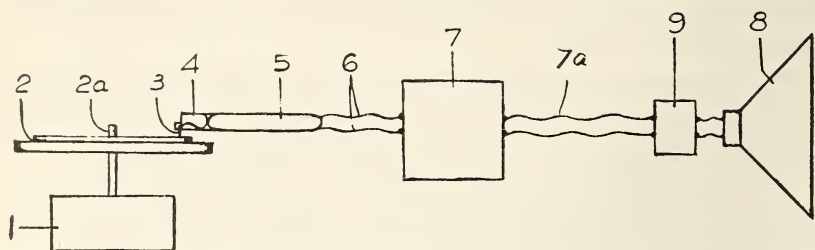
(3) Both instruments made use of a playing needle which was mounted in a playing head.

(4) The playing head in both contrivances was carried by a suspension arm but in the suspension arm of the earlier instrument a diaphragm was employed, while in the newer type of instrument a magnetic coil of the electrical type was adopted (a device similar to the one to be found in a telephone receiver).

(5) In the mechanical type of gramophone the sound vibrations were carried into a horn or sound-box which served the purpose of the present-day loud-speaker, and were emitted to the air as an acoustic reproduction of the vibrations which occurred when the needle came into contact with the sinuous groove on the record. In the electrically-operated and electrically-equipped gramophone, the original vibrations so caused were transmuted by the action of the magnetic coil into electrical impulses which were carried along wires running through the suspension arm into an amplifier and continued along wires to a loud-speaker. At this point the electrical impulses, generated as stated, were transmuted back into mechanical vibrations and, after coming into contact with a membrane, were emitted into the air from the loud-speaker as mechanical vibrations which produced sound.

The witness Dowding examined the control-room of the A.B.C. Company as well as the premises of the other defendants and the equipment installed therein. During his cross-examination he was shown a sketch which was produced by counsel for the defendants and filed as ex. 24. This sketch shows in diagrammatic form the various instrumentalities which compose the equipment of the defendant A.B.C. Company located in part on its premises and in part on the premises of its customers. A

copy of this sketch is attached to these reasons for judgment for ready reference as Schedule "A":



The figures shown on the sketch have been numbered and represent the following instrumentalities respectively:

1. Motor.
2. Turntable.
- 2a. Spindle of motor operating the turntable.
3. Stylus or needle.
4. Playing head holding the needle and having a magnetic pick-up, that is, a coil in a magnetic field.
5. Suspension arm.
6. Electrical connecting wires from the coil in the playing-head leading to
7. An amplifier. The amplifier is connected by electrical wires to
- 7a. Electrical connecting wires of varying length from the amplifier. The two wavy lines between the parts numbered 8 and 9 also represent electrical connecting wires of varying length between the amplifier 9 and the loud-speaker 8.
8. Loud-speaker.
9. Amplifier interposed in advance of loud-speaker 8.

It may be stated that the instrumentalities numbered 1 to 7a, inclusive, are located on the premises of the A.B.C. Company, 7a representing the telephone wires which are used as a means of conduction. The remaining instrumentalities are located on the premises of the defendants other than the A.B.C. Company. It should be added that in the control-room there are four turntables which are connected with gear designed to enable the operator in the control-room to disengage one turntable and engage another without causing any appreciable interruption in the programme. Jacks and patch panels are also installed to enable the rapid introduction into service of another amplifier as a substitute for one which may have become defective. All

the expert witnesses agree that the instrumentalities of which the A.B.C. Company's system is composed, saving and excepting such added equipment as the jacks, patch panels, and other switching devices and an additional amplifier and additional loud-speakers (of which there are at least five in use in each establishment, located at various points in the lounges), are the same instrumentalities as those which form the component parts of a phonograph. Both the defendants' expert witnesses Delbert Beverley Black and William Edward Hodges are highly qualified in their particular fields and I accept their testimony wherever there is a material variance between it and the testimony of the plaintiff's witness Dowding, whose training and experience would not entitle his opinion to nearly as much weight as should be attached to the evidence of Black and Hodges. Both Black and Hodges assert that the instrumentalities located in the studios of the A.B.C. Company or the component parts of any gramophone or phonograph will function whether the same are enclosed in a cabinet or not. The witness Black defines a system as "a group of components which may be put together in any form to obtain a certain result". He states that the equipment of the A.B.C. Company, both that part thereof which is located in its control-room and the part thereof which is located in the premises of the other defendants, constitutes a system. He states further that any radio receiving set is a system as is a phonograph or gramophone; that they all form a system designed to produce acoustic sounds.

It is true that amplifier 9 and loud-speaker 8 can be controlled at will by the various subscribers to the A.B.C. Company's service on their own premises, but when loud-speaker 8 is switched on, then without doubt all the other instrumentalities numbered 1 to 9 are brought into play. It is futile to contend that the performance, with which we are concerned in this case, is produced by means of an instrument or series of instruments located on the premises of the three defendants other than the A.B.C. Company, and represented by the figures 8 and 9 on the sketch, ex. 24. If the loud-speaker were severed from instrumentalities numbered 1 to 9, then it is plain that no sound would be emitted from the loud-speakers, except such sound as would originate in the hand microphones which are connected with the loud-speakers and used either for the purpose of paging customers or making more audible instrumental or vocal music which

originates on the premises as the result of a "live" performance. It need hardly be stated, of course, that there are dimensional differences between the ordinary domestic gramophone and the more ruggedly constructed instrument installed in the control-room of the defendant the A.B.C. Company. In all essential details, however, both operate on precisely the same principles. If it were not necessary to conduct a low current over the Bell Telephone wires so as not to interfere by electrical induction with the contemporaneous use of other parallel wires by other customers of the Bell Telephone Company, it would not be necessary to use more than one amplifier in the system.

The plaintiff maintains that the public performance of which it complains is not a performance "by means of any gramophone" and that the defendants are therefore not exonerated from the payment of fees, charges or royalties by virtue of the provisions of subs. 6(a) of s. 10B. It is argued on the plaintiff's behalf that the word "gramophone" must be given a restricted meaning and interpreted in the sense in which it was used in the year 1938 when the amending subsection was enacted. The plaintiff would restrict the performance which relieves the owners or users of gramophones from payment of fees or charges to the plaintiff, to the performance by means of a gramophone, all the instrumentalities composing which are contained in a single cabinet and in one room.

The witness Black, who is the sound system engineering laboratory supervisor of the Stromberg-Carlson Company in Toronto, has made installations in schools and other institutions where a centrally-located turntable was employed and, through the medium of wires connected to loud-speakers in the various classrooms, could initiate sound-waves which could be heard simultaneously in all the classrooms equipped to receive and amplify the same. In Sunnybrook Hospital, situated in Leaside, Ontario, a similar system has been set up with connections to outlets not only in other portions of the same building, but in other buildings in the group of buildings comprising the hospital. Any sound vibrations originating in the central control-room can be heard at any of these outlets coinstantaneously.

For some years prior to the year 1938, telephone wires were utilized as a means of conduction to make possible what have been described as "coast-to-coast hook-ups" so that a radio broadcast which was initiated on the Atlantic coast could be heard with perfect clarity on the Pacific seaboard. Prior to that same year,

hotels in various parts of Canada, by means of a master radio receiving set located in a control-room, with the aid of wires extended to loud-speakers in the bedrooms of the hotel and such larger rooms as the dining room thereof, transmitted the same radio programme to many portions of the hotel. An instance of this can be seen in the case of *Canadian Performing Right Society (Ltd.) v. The Ford Hotel Co. of Montreal (Ltd.)*, 73 Que. S.C. 18, [1935] 2 D.L.R. 391. Another example of the employment of this principle of sound transmission is to be found in the Massachusetts case of *Noble v. 160 Commonwealth Avenue Incorporated*, reported in Copyright Decisions 1935-1937, Library of Congress of the United States, p. 210; also in 34 U.S. Patent Quarterly, p. 105. That case was decided in the year 1937. For some years prior to the year 1938 it was well known that a loud-speaker could be connected with a radio receiving set or a phonograph so as to enable music to be heard in more remote portions of a private house. All these facts must be kept in mind when one considers the plaintiff's contention that the interpretation of the word "gramophone" in the amending subsection in question herein is to be restricted within the narrow compass previously indicated.

In Craies on Statute Law, 4th ed. 1936, p. 80, the following rule of statutory construction is stated: "The rule that the language used by the Legislature must be construed in its natural and ordinary sense requires some explanation. The sense must be that which the words used ordinarily bore at the time when the statute was passed."

The learned author proceeds to quote the words of Lord Esher M.R. in *The Clerical, Medical and General Life Assurance Society v. Carter* (1889), 22 Q.B.D. 444 at 448: ". . . there has been a long discussion of various puzzling matters in relation to the provisions of the Income Tax Acts, but after all we must construe the words of Schedule D. according to the ordinary canon of construction, that is to say, by *giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross and manifest absurdity would be thereby produced.*" (The italics are those of the author.)

In Odgers on The Construction of Deeds and Statutes, 1937, p. 174, the rule is stated as follows: "Words are taken to be used in the sense they bore at the time the statute was passed."

After stating the rule the learned author quotes what was said by Lord Esher in *The Longford* (1889), 14 P.D. 34, and

quoted by Collins M.R. in *The Burns*, [1907] P. 137, as follows: "The first point to be borne in mind is that the Act [6 & 7 Will. 4, a private Act] must be construed as if one were interpreting it the day after it was passed . . . The word 'action' mentioned in the section was not applicable, when the Act was passed, to the procedure of the Admiralty Court. Admiralty actions were then called 'suits' or 'causes'; moreover, the Admiralty Court was not called, and was not, one of His Majesty's Courts of law."

This general rule, of course, is subject to very many exceptions, particularly if an interpretation made in strict accordance therewith would lead to a manifest absurdity.

A further relevant rule of statutory construction is set forth in Maxwell on The Interpretation of Statutes, 9th ed. 1946, at p. 55, in these terms: "The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view."

It is quite unthinkable that Parliament in enacting subs. 6(a) of s. 10B could have intended to exonerate from payment of fees or charges a performance by means of an antiquated, outmoded type of gramophone, but not a performance by means of the most modern instrument of that genus embodying all the latest improvements and refinements.

Adverting again to the submission of the plaintiff that the musical compositions with respect to which it possessed the performing rights were performed by means of an instrument known or described as a loud-speaker, would it not be manifestly absurd to suppose that Parliament intended to permit fees or charges to be collected in respect of performances by means of an instrument not capable by itself of producing sound? Furthermore, if the loud-speakers in the lounges of the establishments conducted by the defendants other than the A.B.C. Company were connected by means of wires to a self-contained radio receiving set in the office of the establishment, could it be successfully contended that these combined instrumentalities were not a radio receiving set within the meaning of the subsection, so as to enjoy the immunity which the same affords?

To carry the matter one step further, let us envisage the case of a factory-owner whose employees have demanded as one of life's amenities the privilege of enjoying music while they work. The employer could purchase a gramophone or phonograph, together with a quantity of records, and hire a girl to

operate it. Obviously the performance by means of the phonograph or gramophone would, in such circumstances, enjoy exemption under the provisions of the subsection. If, however, his plant was a large one and occupied three floors of a building, and the workers on one of the other floors, hearing the strains of music floating from the first floor, requested the factory-owner to extend a similar privilege to them, he could, of course, purchase another phonograph and have it operated on the upper floor or floors, in which case the performance on such floors would again enjoy exemption under the terms of subs. 6(a). If one were to suppose that the factory-owner, with a view to saving expense, enlarged the sound-producing capacity of the first instrument by running wires to loud-speakers located on the other floors, can it be seriously contended that in this case the performance on such floors would not enjoy relief from the burden of paying fees or charges to the owners of the copyright in musical compositions played on the gramophone? Let it be supposed that the employer is approached by a person engaged in a business similar to that carried on by the A.B.C. Company who undertakes to operate a centrally-located gramophone on the factory premises and supply the records and a trained operator. In such circumstances can it be properly contended that the performance thus provided is not covered by the exempting provisions of subs. 6(a)? If not, then it seems to me that there is no substantial difference between the performance of the musical compositions on the factory premises or from a centrally-located control-room some distance away from the factory owned and controlled by the person who engages in the business of providing musical performances in the manner indicated.

As an instance of a further absurdity to which the narrow construction contended for would lead, one can conceive of the case of a restaurant-keeper who, in the upstairs portion of the premises in which he carries on his business, keeps a combination radio-phonograph which is connected by means of wires to a loud-speaker located downstairs in the restaurant, which makes audible to people in the restaurant programmes originating either in the radio portion of the instrument or in the phonograph portion thereof. If the plaintiff's contention is sound, then those programmes which originate in the radio receiving set are exonerated by subs. 6(a), but not those which originate in the phonograph, and the restaurant-keeper finds himself the possessor of an instrument which is half slave and half free. The

defendant the A.B.C. Company is in precisely this position inasmuch as it has a radio receiving set in its control-room and radio programmes of general interest are often transmitted over its leased wire system to the customers who subscribe to the service provided by it.

Section 10 of The Interpretation Act, R.S.C. 1927, c. 1, reads as follows: "The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning."

In Maxwell, *op. cit.*, the author deals with the proposition involved in the extension of the language of a statute to new things and at p. 82 he puts it thus: "Except in some cases where the principle of excessively strict construction has been applied, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it."

The author cites many cases in support of this proposition and reference is made to the case of *The Attorney-General v. The Edison Telephone Company of London (Limited)* (1880), 6 Q.B.D. 244, as illustrating the principle. In the latter case it was held that the telephone was a "telegraph" within the meaning of The Telegram Acts 1863 and 1869, though not invented or contemplated in 1869, so that the monopoly which under the statute had been granted to the Postmaster-General of England covering the transmission of telegraph messages was extended to the transmission of messages by telephone. At p. 256 Stephen J. in his reasons for judgment stated:

"It is difficult to suppose that the legislature intended to grant a monopoly so liable to be defeated, or that its language was meant to be so construed as to be limited to the then state of, perhaps, the most progressive of all sciences."

It should be borne in mind that the provisions of the statute relating to performing rights societies are regulatory and for that reason the following rule of construction stated in Maxwell, *op. cit.*, at p. 20, quoting from the judgment delivered by Lord Shaw of Dunfermline in *Shannon Realties, Limited v. Ville de St. Michel*, [1924] A.C. 185 at 192, [1924] 1 D.L.R. 119, is not without significance in this case:

“Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.”

Subsection 6(a) first came before the Courts for consideration in the case of *Canadian Performing Right Society Limited v. Vigneux et al.*, [1942] Ex. C.R. 129, 2 Fox Pat. C. 179, 2 C.P.R. 59, [1942] 3 D.L.R. 449. That case arose out of the renting of an electric gramophone, popularly known as a “juke box”, by the owner thereof to a restaurateur. The latter placed the same at the disposal of his customers, who, by depositing a coin in a slot, could operate an automatic selecting-arm which would choose a particular record and the instrument would then be set in operation giving forth a clamorous cacophony which sometimes passed for music. The owners of the gramophone not only supplied the instrument but supplied records from time to time and under their agreement with the restaurateur they were entitled to a payment of \$10 per week, the lessee or owner of the premises being entitled to retain any surplus. The learned late President of the Exchequer Court, while holding that the instrument in question was a gramophone, as was apparently conceded by all parties, held that the owner of the same as well as the lessee thereof were not the owners or users of a gramophone giving public performances in the sense contemplated by The Copyright Act and the interpretation which he rendered was controlled by what that learned judge deemed to be the purpose or scope of the amendment. This is set forth at p. 136 of the judgment of the learned President:

“I am satisfied that the idea prompting the enactment of ss. 6(a) was to obviate the collection of any fees or royalties from the user of gramophones, by which means were performed musical works which were the subject of copyright, in the cases where the user was in a small and rather inconsequential way, and where any direct or incidental profit from such user was small, if any at all. Again, this may be inferred from the concluding words of ss. 6(a) because the Copyright Appeal Board in fixing the amount to be collected from gramophone manufacturers, if any, was directed to take into consideration ‘all expenses of collection and other outlays, if any, saved or savable by or on behalf of the owner of the copyright or

performing right concerned or his agents, in consequence of the provisions of this subsection'. And no doubt there would be a great saving in the cost of the collection of the fees and royalties suggested by ss. 6(a), from a few gramophone manufacturers, as compared with the cost of the collection of any fees or royalties likely to be approved and certified by the Copyright Appeal Board and payable by this numerous class of 'owners or users' which I have suggested, and who would be widely scattered about the country. That it was for the relief of that numerous class ss. 6(a) was enacted seems to me to be fairly plain, and I think that may fairly be assumed from the language of the subsection itself."

And it further appears from his reasons on p. 137, which I quote: "The conclusion which I have reached is that the defendants do not fall within the class protected by ss. 6(a) of sec. 10B. They are not I think the 'owner or user' of a gramophone giving public performances in the sense contemplated by that statutory provision. They are virtually partners in a distinct class of business, in a venture of publicly performing musical works purely for profit, for a fee in the form of a coin or coins deposited in the gramophone by the person desiring the performance of certain musical works, and presumably for the gratification of that person. The whole scheme is entirely one for profit making, something apart from the restaurant business itself, or the ownership of the gramophone, one contributes the gramophone and the records and services the same, and the other contributes the premises, and they invite such of the public as desire the performance of musical works to deposit a certain coin in the gramophone, and this automatically causes the gramophone to perform musical works for the person who has paid a fee in the form of coins of a certain denomination. This is not I think what was contemplated by ss. 6(a) of sec. 10B. In the case before me it would seem inequitable and unjust if the defendants could do as they are doing, with impunity, using the plaintiff's copyright without licence or compensation, something which is entirely against the whole purpose and spirit of the Copyright Act, something which might affect the interests not only of Canadian subjects but those of foreign countries, under the provisions of the Berne Convention."

On appeal to the Supreme Court of Canada this judgment was sustained with some slight variation which is not here material: *Vigneux et al. v. Canadian Performing Right Society*,

Limited, [1943] S.C.R. 348, 3 Fox Pat. C. 77, 2 C.P.R. 251, [1943] 3 D.L.R. 369. Sir Lyman Duff, Chief Justice of Canada, agreed with that portion of the judgment of Maclean J. expressing his view as to the scope or object of the amendment, as will be seen by reference to pp. 357-8 of the reasons for judgment of the learned Chief Justice of Canada. The defendants appealed to His Majesty in Council and the appeal was allowed and the action dismissed: [1945] A.C. 108, [1945] 1 All E.R. 432, 4 Fox Pat. C. 183, 4 C.P.R. 65, [1945] 2 D.L.R. 1.

In the Privy Council their Lordships took the view that the words of the subsection were clear enough to deprive the plaintiff of its rights against the defendants in the action and pointed out that it provided by way of compensation for the payment of an appropriate sum payable "in advance" which "apparently meant in advance of any public performance and therefore payable whether or not the public performance did in fact take place".

It was urged before their Lordships, as it is urged by counsel on behalf of the plaintiff in the case at bar, that no charges or fees had been fixed by the Copyright Appeal Board for payment by the manufacturers of gramophones and, accordingly, no payment having been made, the performance was an infringement of the plaintiff's copyright. Dealing with this point, their Lordships stated at p. 121:

" . . . the statutory licence (or, in other words, the statutory right to perform) which the subsection confers is in no way conditional on payment of the charges which the subsection enacts are to be payable by broadcasting stations or gramophone manufacturers. Indeed, such a condition would, far from relieving the owners of receiving sets or gramophones from uncertainties, only add to their doubts and perplexity. The exoneration of owners or users of receiving sets and gramophones from all payments in respect of public performances of musical compositions by means of those instruments in the specified circumstance is absolute, unqualified and unconditional, and, in their Lordships' opinion, must necessarily carry with it the consequence that as from the date of the coming into operation of the sub-section, such a public performance was a lawful act and no infringement of copyright."

This reasoning, in my view, effectively disposes of the plaintiff's contention arising from the fact that the defendant the A.B.C. Company purchased from several dealers the component

parts of their instrumentalities which were then assembled, with the result that there was no identifiable manufacturer from whom the collection of fees, charges or royalties could be made, even if the Copyright Appeal Board had executed the duty assigned to it by the statute, and that consequently the defendants are not exonerated by the provisions of the amending subsection. This, it seems to me is *nihil ad rem*.

I do not overlook the fact that in the reasons for judgment given by Lord Russell of Killowen in the *Vigneux* case, *supra*, at p. 123 it was stated: "Their Lordships are unable to accept the view of the President (accepted by Sir Lyman Duff and Davis J.) that Raes and Vigneux were carrying on 'a distinct class of business, a venture of publicly performing musical works purely for profit.' They can see no foundation on which such a view can be based. As stated above, Raes hired a machine which they thought would attract custom to their restaurant. Vigneux supplied the machine in the ordinary course of their business, at a fixed rental; they had no interest beyond that. To hold, on those materials, that 'they are virtually partners in a distinct class of business,' and to decide the case on that ground, cannot, in their Lordships' opinion, be justified."

As, however, the Vigneux brothers were, in their Lordships' view, entitled to the protection of the subsection as they contended, this latter dictum would seem to be obiter and related to a matter, at least as far as one may gather from the report of the case, which was quite outside the scope of the defence presented and was never argued.

During the course of his argument, counsel for the plaintiff contended with great vigour that Parliament was in effect depriving the plaintiff of a proprietary right to which it was entitled by law and that subs. 6(a) must, therefore, be strictly construed. He referred to a passage in the judgment of Lord Wright M.R. in *Jennings v. Stephens*, [1936] Ch. 469 at 480, [1936] 1 All E.R. 409 at 415, from which I quote:

"The same is true of musical compositions and of lectures. It is the duty of the Court to protect the rights of authors, composers and lecturers, according to a fair construction of the statute."

In this connection it is interesting to observe what Duff C.J.C. had to say about the enactment of the legislation designed to regulate the business of Performing Right Societies. In the

Vigneux case, [1943] S.C.R. at p. 353, Sir Lyman Duff commented as follows:

“Under this plan the dealer in performing rights has his sole right to perform any particular musical composition in public qualified by a statutory license vested in everybody who pays or tenders to the dealer a fee, charge or royalty which has been fixed by the Copyright Appeal Board and notified in the *Canada Gazette*. That seems like a revolutionary change, but it is evident that the legislature realized in 1931 that this business in which the dealers were engaged is a business affected with a public interest; and it was felt to be unfair and unjust that these dealers should possess the power so to control such performing rights as to enable them to exact from people purchasing gramophone records and sheets of music and radio receiving sets such tolls as it might please them to exact. It is of the first importance, in my opinion, to take notice of this recognition by the legislature of the fact that these dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation. It is not out of place here to call attention to an observation of Lord Justice Lindley in *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at 128:

“‘Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic. The protection of authors, whether of inventions, works of art or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.’

“This passage expresses the *raison d'être* of the enactments under consideration.”

The Chief Justice of Canada also expressed the opinion that the wording of subs. 6(a) was clear and this opinion was shared by Lord Russell of Killowen: see [1945] A.C. at p. 121.

The statute was designed as much for the protection of the public as for the protection of copyright-owners, and calls for a fair construction—fair not only from the standpoint of copyright-owners but also from the standpoint of the public. The judgment of the Privy Council in the *Vigneux* case strengthens the view that the fact that the A.B.C. Company directly and the other defendants indirectly performed for profit, is not an answer. Adopting the principle that the sole guide to the interpretation of the statute is the statute itself, the conclusion seems to me to be inescapable that Parliament covered all the exceptions it intended when it referred to performances “in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made”.

The Copyright Act deals broadly with the product of the mind of a copyright-owner with relation to (a) copies of the work, and (b) performance thereof. In my view, altogether too much emphasis is laid by the plaintiff on the location of the instrumentalities by reason of which the performance is achieved. I feel constrained to hold on all the evidence that, notwithstanding the separation of the component instrumentalities of the A.B.C. Company, it was at the time and place in question providing a public performance “by means of a gramophone” and the same can be said of its co-defendants. In my judgment the location of the instrumentality by which the performance is produced is completely immaterial, provided that it occurs in a place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made. It follows that under the statute there is an unconditional exoneration of all the defendants from payment of any fees, charges or royalties to the plaintiff and that the performances of which the plaintiff complains were lawful and did not constitute infringements of the plaintiff's copyright.

For the reasons stated, the plaintiff's action fails and I direct that judgment be entered dismissing its action with costs payable to the defendants forthwith after taxation thereof.

Action dismissed with costs.

Solicitors for the plaintiff: Manning, Mortimer & Kennedy, Toronto.

Solicitors for the defendants: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

[COURT OF APPEAL.]

**Dalglish v. The Prescott Arena Company Limited
and Woodward.**

Mechanics' Liens—To What Interest Lien Attaches—Sublease Granted on Condition that Repairs Made—Lien of Contractor Employed by Sublessee—The Mechanics' Lien Act, R.S.O. 1937, c. 200, s. 1(c).

P. Co., the lessee from the Crown of an arena building, gave a sublease of it to W., on condition (expressed in the lease) that W. make repairs and alterations to the building. W. consulted the plaintiff and went with him, before the execution of the sublease, to interview the directors of the company, who outlined the work they wanted done. The plaintiff, under an oral contract with W., did the work, and subsequently sought to establish a lien against the leasehold interest of P. Co. in the land.

Held, P. Co. was not the "owner" of the land within the definition of that term in s. 1(c) of The Mechanics' Lien Act, and the plaintiff's lien did not attach to its interest. While the company had imposed upon W. the obligation to make the repairs and alterations, there had been no direct dealings between it and the plaintiff, and at no time did there exist any contractual relation between them. Admittedly no instructions were at any time given by the company to the plaintiff with respect to the doing of any of the work, and mere knowledge that the work was being done was not enough to fix the company with liability.

AN APPEAL by the plaintiff from the following judgment of Lewis Co. Ct. J., sitting as Local Judge at Brockville:

17th May 1950. LEWIS Co. Ct. J.:—On the evidence adduced I find that the facts in this case are as follows:

The defendant Prescott Arena Company Limited is the lessee of a parcel of land in the town of Prescott by virtue of a lease from His Majesty the King, which was renewed on the 30th December 1949 for a period of ten years. Upon this land is erected a skating arena.

By lease dated in November 1948 the company leased the lands and arena to the defendant Woodward. The terms of the lease required Woodward, among other things, to remodel dressing-rooms and provide toilet facilities. During the negotiations for the lease, and prior to its execution, Woodward and the plaintiff reviewed the plans for the work with the president, secretary and directors of the company, and received their approval.

The plaintiff proceeded with the work, which included items stipulated in the lease and other items of repair, necessary for the safety of the public. The plaintiff had no contract, with plans and specifications, for this work, and no price was set

for it. The plaintiff was engaged to provide labour and material at the direction of Woodward, on a "time-and-material" basis.

The plaintiff submitted his account, in the amount of \$2,173.77, as of the 18th December 1948. The details of this account and the amount of the charges made by the plaintiff are not disputed and the defendant Woodward is indebted to the plaintiff in the sum of \$2,173.77. Subsequently, on the 13th and 18th April 1949, the plaintiff provided labour in the amount of \$12.77 on the said building. The defendant Woodward is indebted to the plaintiff in the further sum of \$12.77.

One of the propositions the defendant Woodward considered was the laying of wooden flooring in the arena to provide facilities for summer activities in the building. Estimates for such flooring were obtained from the plaintiff and the defendant Woodward swears that the cost of this flooring was too high and ultimately it was arranged to rent flooring for temporary installation. No work was done in this connection until the ice was out in the spring, and then the plaintiff was engaged to lay the rented flooring in the said building. In order to provide means for getting the sections of rented flooring into the building, the plaintiff removed protective wire netting from the west end of the hockey cushion. This is the labour that was performed by the plaintiff in the month of April 1949. The defendant Woodward swears that at no time were the services of the plaintiff terminated after the plaintiff commenced work until the last work was done in April 1949. The defendant swears that during the winter the plaintiff on some occasions attended at the arena and rectified certain damages that had occurred as a result of the use of the building. In the plaintiff's account there appears to be no charge for this service, and it may be that the plaintiff intended to make no charge.

From the evidence of the plaintiff and his witness Dalgleish, and from the evidence of the defendant Woodward, I find as a fact that there was no subsequent contract between the defendant Woodward and the plaintiff, and that the continual employment by the defendant Woodward of the plaintiff throughout the period from November 1948 to April 1949 entitles the plaintiff to make his charges on open account, and that the last work or material supplied on this open account was on 18th April 1949. No evidence was adduced by the defendant

to refute the evidence of the plaintiff and his witness in this respect. No suggestion of fraud or collusion, for the purpose of reviving the lien, was developed in cross-examination.

Therefore I find as a fact that the plaintiff is entitled to a lien for the sum of \$2,186.54 and costs upon the estate and interest of the defendant Woodward in the lands in question.

The defendant Prescott Arena Company Limited relies upon the provisions of The Mechanics' Lien Act, R.S.O. 1937, c. 200, and argues that it is not an "owner" within the terms of s. 1(c) of the Act, and that therefore its estate or interest in the lands cannot be charged with the lien. The stipulation in the lease to the defendant Woodward, that the lessee repair and make certain alterations and additions to the building, has been held to be a sufficient request to comply with the provisions of the Act: *Fulton Hardware Co. v. Mitchell*, 54 O.L.R. 472, [1923] 4 D.L.R. 1205. But there is a further qualification to establish the status of an "owner" under the Act. This work was not done on the credit of the defendant company, nor was it done on the company's behalf. However, the plaintiff argues that it was done with the privity and consent of the defendant company. The judgment of the Court in *Stuart & Sinclair Ltd. v. Biltmore Park Estates Ltd.*, [1931] O.R. 315, [1931] 3 D.L.R. 345, followed the principle laid down in *John A. Marshall Brick Company et al. v. The York Farmers Colonization Company* (1917), 54 S.C.R. 569, 36 D.L.R. 420, that the mere knowledge of, or mere consent to, the work being done is not sufficient to fix the owner as having had the work done with his privity and consent. There must be some direct dealing between the contractor and the person whose interest is sought to be charged. In this case there was no such relationship.

The further element necessary to qualify an owner is that the work was done for his direct benefit. The judgment of the Court in *Crown Construction Company et al. v. Cash et al.*, [1940] O.R. 371, [1940] 4 D.L.R. 240, reversed the decision of the lower Court and disallowed the lienholder's right to charge the interest of the "owner", in circumstances very similar to this case. The rights of the lessee and those of lienholders entitled to liens against the estate and interest of the lessee are fully covered in the judgment.

For these reasons I dismiss the action, as against the defendant Prescott Arena Company Limited, with costs.

6th February 1951. The appeal was heard by HENDERSON, HOGG and MACKAY JJ.A.

K. G. Morden, K.C., for the plaintiff, appellant: This whole case turns upon the interpretation of the definition of "owner" in s. 1(c) of The Mechanics' Lien Act, now R.S.O. 1950, c. 227. The meaning there given to the word is an artificial one, and not its natural meaning, and our submission is that the defendant company comes within the definition. The company has an interest in the land as required by the definition, and further, as the trial judge expressly found, the work was done at the company's request: *Orr v. Robertson* (1915), 34 O.L.R. 137, 23 D.L.R. 17. It should further be held that the work was done with the privity and consent of the company, within clause iii of s. 1(c): *Graham v. Williams* (1885), 8 O.R. 478, affirmed (1885), 9 O.R. 458; *Gearing v. Robinson* (1900), 27 O.A.R. 364; *Marshall Brick Co. v. Irving* (1916), 35 O.L.R. 542, 28 D.L.R. 464, affirmed *sub nom. John A. Marshall Brick Company et al. v. The York Farmers Colonization Company* (1917), 54 S.C.R. 569, 36 D.L.R. 420; *Partridge v. Dunham et al.*, 40 Man. R. 165, [1932] 1 W.W.R. 99, [1932] 1 D.L.R. 600. It is true that mere knowledge and even consent is not privity as required by s. 1(c) (iii), but on the other hand it is not necessary to prove a direct contractual relationship. Something between these two, in the nature of a direct dealing, is all that is required: *Marshall Brick Co. v. Irving, supra*. There is no doubt here that the defendant company consented. It said that the work must be done, and in fact made it a condition of the lease to Woodward. There was direct dealing from the inception of negotiations. The plaintiff was taken by Woodward to a directors' meeting of the company, and the directors discussed with Woodward and the plaintiff what was wanted. If the Legislature had intended that there should be a direct contractual relationship it could have said so in plain words, but it has not.

Further, the work done was for the direct benefit of the defendant company: s. 1(c) (iv). The improvements were to remain the property of the company. The rent was to increase

each year, and the value of the reversion was increased. The improvements were permanent, while the lease to Woodward was for only three years: *McNulty Brothers v. Offerman et al.* (1910), 141 App. Div. (N.Y.) 730; *Henry et al. v. Miller* (1908), 145 Ill. App. 628. Where the owner of the fee simple has given a lease with an option to purchase (*Graham v. Williams, supra*), or a long-term lease (*Stuart & Sinclair Ltd. v. Biltmore Park Estates Ltd.*, [1931] O.R. 315, [1931] 3 D.L.R. 345), or has sold the land (*Marshall Brick Co. v. Irving, supra*), it is obvious that there is no direct benefit to the owner of the fee simple from the work done on the land. This case, however, is quite distinguishable from those circumstances. If this judgment stands, then the defendant company has obtained substantial and expensive permanent improvements to its building at no cost to itself. The definition of "owner" in the Act is intended to obviate this unfair result, which really amounts to unjust enrichment.

J. D. Arnup, K.C. (*R. B. Robinson*, with him), for the defendant company, respondent: Neither in law nor on the facts was the company an owner within the meaning of the Act. There is nothing in the facts to indicate any direct dealing between the plaintiff and the company. It is true that the plaintiff went with Woodward to a meeting of the directors, where the directors told Woodward what they wanted done. The actual agreement between Woodward and the plaintiff went much further than what the company insisted should be done.

The argument that this work was for our direct benefit would be applicable only if it were shown that there was a request from us. In any event, in the long run we receive only some indirect benefit. The appellant seeks to distinguish the position, as to benefit, in short-term leases and in long-term leases. On principle it should make no difference whether one has a three-year lease, with a right of renewal (as we have here) or a forty-year lease.

Orr v. Robertson, supra, is the beginning of a line of cases. It is a very short judgment, and holds merely that the taking of a contract from a subtenant to do work specified by the tenant, and according to plans approved of by the tenant, constitutes a request by the tenant within the meaning of the statute. The next case in this line is *Cut-Rate Plate Glass Co.*

v. Sodolinski (1915), 34 O.L.R. 604, 25 D.L.R. 533, where the Court, similarly constituted, distinguished *Orr v. Robertson* and, at p. 607, gave further particulars of that case. As it is there explained, it appears that the tenant in *Orr v. Robertson* had signed the plan that formed part of the contract between the subtenant and the contractor, and had taken out the building permit. In *Marshall Brick Co. v. Irving, supra*, Riddell J., in further explanation of *Orr v. Robertson*, said that the judgment of the Court, delivered by him, was unduly short and did not really express what the Court held. *Orr v. Robertson* is further discussed in the Supreme Court of Canada in the *Marshall Brick* case. *Stuart & Sinclair Ltd. v. Biltmore Park Estates Ltd., supra*, ends the argument that the relationship need not be contractual. Middleton J.A., delivering the majority judgment, said at p. 317 that the *Marshall Brick* case conclusively determined that question, and he clearly interpreted the view of the majority of the Supreme Court in that case as meaning that a direct contractual relationship was necessary. This is confirmed by *Partridge v. Dunham et al., supra*.

The learned judge erred in finding that the lien was registered in time. The original contract was fully performed in December 1948. The plaintiff tried to revive his lien by doing work worth \$12.77 some months after the completion of the contract he was hired to perform. The nature of the work done in 1949 was quite different from and had no relation to the work for which he was originally hired, and constituted a new contract between the plaintiff and Woodward: *Fulton Hardware Co. v. Mitchell*, 54 O.L.R. 472, [1923] 4 D.L.R. 1205. This is borne out by the way the plaintiff acted. He sent a "follow-up" bill to Woodward (to whom he looked for payment) in March; certainly at that time he regarded the job as finished, and wanted his money. In April he did a little more work in order to revive his lien, and added it to his bill.

K. G. Morden, K.C., in reply: The *Marshall Brick* case, *supra*, is not authority for the proposition that the relationship must be contractual, although there is undoubtedly this suggestion in the *Stuart & Sinclair Ltd.* case. There is direct benefit to the defendant company. The rent payable by Woodward for the three years of the lease was \$800, \$1,000 and \$1,200 respectively, and the value of the reversion is increased.

The lien was filed in time. The work done in April was not an afterthought, but was contemplated in November and December before the first work was done; it could not be done, however, until the ice was taken out of the arena. Where work is done under one continuing contract, although it is done at different times, a lien filed within the statutory period after the last piece of work is done is sufficient as to all the work: *Fulton Hardware Co. v. Mitchell*, *supra*. The triviality of the work done, or of its value, does not affect the question, which is whether in fact it is work done in good faith to complete the contract: *Russell v. Ontario Foundation and Engineering Co.*, 58 O.L.R. 260, [1926] 1 D.L.R. 760.

Cur. adv. vult.

8th February 1951. The judgment of the Court was delivered by

HENDERSON J.A.:—An appeal by the plaintiff from the judgment of His Honour Judge Lewis, Local Judge at Brockville, of the 17th May 1950, whereby the plaintiff recovered judgment against the defendant Reginald Woodward in the sum of \$2,594.49, and the action against the defendant The Prescott Arena Company Limited was dismissed. The defendant Woodward does not appeal.

The plaintiff claims to be entitled to a lien against the property of the defendant The Prescott Arena Company Limited under The Mechanics' Lien Act, R.S.O. 1937, c. 200, s. 1(c).

The Prescott Arena Company Limited is a community enterprise in the town of Prescott, and leases from the Dominion Government an arena building in that town. The present lease is for a term of 10 years from 6th December 1949 at a nominal rental of \$1 per year. The defendant Woodward is a resident of Cornwall, with some experience in the promotion of sports and recreational activities, and had been the manager of the Calumet Hockey Club in Cornwall.

In the first week of November 1948, following a preliminary discussion between Woodward and an officer of The Prescott Arena Company Limited, Woodward got in touch with the plaintiff, who is a contractor, and asked him to go to Prescott for the purpose of seeing the arena and deciding what repair work might be necessary to have done to it. The plaintiff and

Woodward went to Prescott and first went to the arena and looked it over, to determine what renovations were necessary. These two then had a discussion with three members of the board of The Prescott Arena Company Limited with a view to the defendant Woodward obtaining a lease (or sublease) from the Arena Company. As a result of the discussion, it was agreed that a lease would be granted to Woodward if he, on his part, would agree to make certain extensive renovations to the arena building. The plaintiff was present at this conversation and says he was not much interested in that aspect of the matter.

The renovations agreed upon were subsequently embodied in the lease from the Arena Company to Woodward, which is ex. 6. The lease also provided that Woodward would provide public skating in the arena at least two nights a week, and would also allow certain clubs the use of the rink on Saturday mornings, and afternoons during the term of the lease.

Following these discussions, the plaintiff proceeded to do certain work as a general contractor, pursuant to a verbal contract arrived at between him and Woodward. This work was finished in the middle of December 1948, and on 18th December 1948 the plaintiff sent his bill to the defendant Woodward. Besides the bill for the work done on the Prescott arena, the invoice included an item for the transportation of the Calumet Hockey Club of Cornwall.

The plaintiff returned in January or February to adjust the locks on some doors that did not fit right, but did no further work of any kind with regard to the repairs originally stipulated for in the lease.

In April 1949 Woodward decided to try having some flooring installed in the arena, so that he could carry on some summer activities such as a boxing show and dancing.

The part taken by the plaintiff in the work which Woodward then decided to carry on involved a total of \$12.77, for which he rendered an account to Woodward. This work was done on 13th and 18th April 1949, and an account for that amount was sent on 25th April 1949, addressed to the Calumet Hockey Rink, Cornwall.

On 13th May 1949, the plaintiff filed a mechanics' lien in the amount of \$2,214.54, and in this action he took the position that the lien was a lien not only on the leasehold interest of

Woodward in the premises but also upon the leasehold interest of The Prescott Arena Company Limited.

We are indebted to counsel for a very full and interesting discussion of the cases involved, of which I append a list, but do not require to discuss them in detail.

The Mechanics' Lien Act is now R.S.O. 1950, c. 227, but the sections involved are in the same language as those of the former Act.

"Owner" is defined in s. 1(c), and the answer of the respondent to the appeal is first that the respondent is not an "owner" within the meaning of the Act. While the Arena Company had imposed upon Woodward an obligation to make certain repairs, and while the Arena Company knew that the plaintiff was the contractor hired by Woodward to do these repairs, there were no direct dealings between the Arena Company and the plaintiff contractor, and at no time did there exist any contractual relation between them. Admittedly no instructions were at any time given by the Arena Company to the plaintiff with respect to the doing of any of the work, and mere knowledge that the work is being done is not enough to fix the owner with liability. I agree with the conclusion of the learned trial judge in this respect. I am of opinion, however, that the plaintiff's lien was not filed until after the expiration of the time required for the filing of a lien, and in this respect I do not agree with the conclusion of the learned trial judge.

For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

The following cases, among others, were referred to: *Orr v. Robertson* (1915), 34 O.L.R. 147, 23 D.L.R. 17; *Graham v. Williams* (1884), 8 O.R. 478, affirmed (1885), 9 O.R. 458; *Gearing v. Robinson* (1900), 27 O.A.R. 364; *Marshall Brick Co. v. Irving* (1916), 35 O.L.R. 542, 28 D.L.R. 464, affirmed *sub nom. John A. Marshall Brick Company et al. v. The York Farmers Colonization Company* (1917), 54 S.C.R. 569, 36 D.L.R. 420; *Stuart & Sinclair Ltd. v. Biltmore Park Estates Ltd.*, [1931] O.R. 315, [1931] 3 D.L.R. 345; *Partridge v. Dunham et al.*, 40 Man. R. 165, [1932] 1 W.W.R. 99, [1932] 1 D.L.R. 600; *Cut-Rate Plate Glass Co. v. Sodolinski* (1915), 34 O.L.R. 604, 25 D.L.R.

533; *Nuspel v. Lem Foo et al.*, [1949] O.W.N. 476; *Fulton Hardware Co. v. Mitchell*, 54 O.L.R. 472, [1923] 4 D.L.R. 1205.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: R. P. Milligan, Cornwall.

Solicitor for the defendant company, respondent: W. M. Dubrule, Prescott.

Solicitor for the defendant Woodward: John A. G. MacDonald, Cornwall.

[COURT OF APPEAL.]

Re Richardson.

Wills—Construction—Right to Live in House for Life—Intestacy as to Remainder following Life Estate—Special Trust Fund.

M.R. devised land to trustees in trust to permit her daughter G.M.R. to live in the house thereon until her death or marriage, with a right to the testatrix's son G.C.B.R. to live there with G.M.R., subject to the payment of board, and on the death or marriage of G.M.R. to sell the land and transfer the net proceeds into "the trust fund herein-after particularly referred to, for all the uses and purposes thereof". By the next clause she directed the setting up, out of the residue of her estate, of a trust fund for the benefit of her brother A.B. for his life, and directed that on A.B.'s death the remainder of the trust fund should be divided equally between G.M.R. and G.C.B.R. A.B. died two years after M.R., and no trust fund was ever set up for his benefit.

Held: (1) G.M.R. acquired no interest in the land that she could either dispose of in her lifetime or devise by will; she acquired no more than a right to occupy it until her death or marriage. Consequently, a clause in G.M.R.'s will whereby she purported to give to G.C.B.R. her "equity" in the land was void and of no legal effect. (*Per curiam.*) (2) The trust fund directed to be set up was for the benefit of A.B. only, and was to continue only during his lifetime. Consequently had the trustees, on his death, divided the remainder, if any, in the fund as directed in the will they would have been free from the duty imposed upon them in respect of the residue of the estate; they would not have been under a continuing duty as trustees in anticipation of an addition to the fund upon the marriage or death of G.M.R. There was therefore no obligation on G.M.R.'s executors to sell the house property and pay the proceeds into the trust fund for distribution. There had been no equitable conversion of the land. M.R. having failed to provide for the disposition of the property in the event, which happened, of G.M.R. surviving A.B., there was an intestacy, and G.C.B.R., as sole surviving heir-at-law of M.R., was entitled to the whole of the net proceeds derived from its sale and conversion. In these circumstances the Court should not compel a conversion against the will of G.C.B.R., the beneficial owner, and he might elect to take the property in its original character. *Lewin on Trusts*, 14th ed., p. 812; *Re Gardner's Trusts* (1853), 1 Eq. Rep. 57; *Mutlow v. Bigg* (1875), 1 Ch. D. 385, applied. (*Per HENDERSON and LAIDLAW JJ.A.; HOGG J.A. contra.*)

Per HOGG J.A., dissenting in part: Since the will of M.R. directed conversion of the land upon the death of G.M.R., it was to be considered as having been converted. Under the rule in *Browne v. Moody et al.*, [1936] A.C. 635, the proceeds of the conversion of the assets of M.R.'s

estate, including the house property, which were intended eventually to form the trust fund, vested in her son and daughter immediately upon her death, although part of the proceeds were not to be distributed until the death or marriage of G.M.R. Therefore the vested interest of G.M.R. in one-half of the whole of the trust fund, including the proceeds from the sale of the land, formed part of the residue of her estate and should be dealt with according to the residuary clause of her will.

AN APPEAL by George Campbell Barr Richardson from the order of Smily J., upon a motion by the executrices of Grace M. Richardson, deceased, for the advice and direction of the Court.

6th October 1950. The appeal was heard by HENDERSON, LAIDLAW and HOGG JJ.A.

W. B. Williston, for the appellant: The main question in this appeal is whether the appellant is entitled, by the combined operation of the two wills, to the property known as 24 Inshes Avenue, Chatham. Under clause 6(e) of Martha Richardson's will the appellant acquired a half interest in the property or the proceeds of its sale, if a sale became necessary. Alexander Barr died before Grace M. Richardson, the life tenant, and before the trust fund referred to in the will of Martha Richardson had been set up, and therefore there was no equitable conversion. If the appellant does not take under clause 6, then he is entitled under clause 7, the residuary clause.

Grace M. Richardson took an interest in the property under clause 6(e) and clause 7, and by her will she tried to devise her interest to the appellant. [HENDERSON J.A.: She had no interest in the house except a right to live there, and an interest in the trust fund when it was set up.] The cases say that a gift of this kind will pass not only the property itself but an interest in the proceeds. [LAIDLAW J.A.; She could not have half the proceeds of the sale of the house because it was not to be sold until she died.] [HENDERSON J.A.: On her death her estate was entitled to a half interest in the trust fund, but that does not entitle her to a share in the house.] If the Grace M. Richardson estate got nothing the appellant would get everything under clause 6(e), or it would fall to be disposed of under clause 7. Grace M. Richardson had a life interest in the property. That was wiped out on her death, but her estate does get an interest in the proceeds, through the trust fund, and that is a right she can dispose of by will to anyone she wishes. When a testator makes a gift of realty and does not have the realty, but has some right arising out of it, such as

an interest in the proceeds of its sale, the disposition is sufficient to give the proceeds to the legatee. [HENDERSON J.A.: Here Grace M. Richardson had no interest in the property that she could devise.] If she had no interest in the proceeds, then the order of Smily J. cannot possibly be right. *In re Glassington; Glassington v. Follett*, [1906] 2 Ch. 305, is very similar to this case. [LAIDLAW J.A.: The testatrix in that case had a devisable estate in the property, but here she had only a life interest.] Her life interest is gone, but she had a right to part of the proceeds. [LAIDLAW J.A.: Grace M. Richardson could not have an interest in the trust fund until there was a trust fund, and there was no trust fund, so far as this property was concerned, until she died. She had to have an interest in her lifetime before her estate could get anything.] If she had no interest that she could devise, clearly the residuary beneficiaries cannot take anything under the residuary clause of her will. Therefore the appellant is the only person entitled. My main contention, however, is that she had a transmissible interest; she had an interest in the land, and when she tried to devise it, her interest went according to that disposition: *In re Lowman; Devenish v. Pester*, [1895] 2 Ch. 348.

Since the appellant has the right to the entire proceeds of the sale of the house by reason of the combined effect of the two wills, he is entitled to elect to take the property as it is, without conversion: Lewin on Trusts, 14th ed. 1939, p. 812.

There can be no doubt that whatever interest Grace M. Richardson had would pass under her will.

Where a testator devises real estate on trust to sell, that operates as an equitable conversion, but where the testator has directed a sale and the beneficiaries all elect to take the property in specie a reconversion is effected. On the death of Alexander Barr the appellant and Grace M. Richardson were the only persons interested in the property. They elected to take it in specie rather than to have the trust fund set up, and they had a right to do so. [LAIDLAW J.A.: The trust fund could not have been set up until Grace M. Richardson's death.] No, but by her will she elected to treat the property as real estate. There has been no equitable conversion, since the purpose of or reason for the conversion disappeared on Barr's death: *In re Lord Grimthorpe; Beckett v. Lord Grimthorpe*, [1908] 2 Ch.

675; *In re Hopkinson*; *Dyson v. Hopkinson*, [1922] 1 Ch. 65. An election to take property in its unconverted state may be express, or it may be presumed from the circumstances. A beneficiary of a trust can elect to reconvert the property at a future time, as on his death, and such an election may be made by will. The election will be effective if all the beneficiaries of the trust consent to the conversion at that time: *Meek v. Devenish* (1877), 6 Ch. D. 566.

Grace M. Richardson had a proprietary interest in the property by reason of the fact that there was no conversion because the purpose of the conversion failed. Alternatively, if there was a conversion there was a reconversion into realty under her will.

This argument is based on the assumption that an interest passed to Grace M. Richardson. As I pointed out above, however, if no interest passed to her, the judgment below is still clearly wrong.

The disposition of costs below was also wrong. They should be paid out of the Grace M. Richardson estate, so that the appellant would bear only one-third.

G. T. Walsh, K.C. (*S. L. Clunis*, with him), for Alice E. Trotter in her personal capacity, respondent: When Grace M. Richardson devised her "equity" in the home she was attempting to devise something that she did not possess. Under the will of Martha Richardson the property was devised to the trustees to be sold by them, the proceeds to become part of the trust fund. Grace M. Richardson's interest in the trust fund came under the residuary clause of her will. There was never any real estate; the direction for conversion in Martha Richardson's will made it personal property. Grace M. Richardson and the appellant each took an interest in this property, and Grace M. Richardson's interest passes under the residuary clause of her will. It never changed its character because it was not given to the beneficiaries themselves, but to trustees. I refer also to *Re Gardner*, [1938] O.W.N. 116.

F. T. Watson, K.C., for the Official Guardian, representing Jocelyn Foster, an infant, respondent: There was nothing available for Grace M. Richardson to pass except personalty, and the attempted devise of her "equity" in the real estate fails. [LAIDLAW J.A.: Your biggest difficulty is to show that there

was anything at all for her to pass.] It is the dealing with the property that is material. The trustees received it on an express trust to sell and convert, and equity will treat it as sold and converted into personalty: Jarman on Wills, 7th ed. 1930, pp. 726-7. Vesting takes place immediately when the only intervening estate is a life estate. Grace M. Richardson therefore had a vested interest in the remainder. The fund came into existence before her death, because there was an intervening life estate, her own: Theobald on Wills, 10th ed. 1947, p. 398; Jarman, *op. cit.*, p. 1331.

This case is distinguishable from *In re Lowman; Devenish v. Pester*, [1895] 2 Ch. 348, where it was held that it did not matter whether the real estate had been in fact converted into cash, and that it might pass as personalty. In *Mutlow v. Bigg* (1875), 1 Ch. D. 385; *Meek v. Devenish* (1877), 6 Ch. D. 566; and *In re Gordon; Roberts v. Gordon* (1877), 6 Ch. D. 531, the person purporting to make the disposition of misdescribed property was solely and absolutely entitled at the effective date to the proceeds of the sale of the land, or to the land. *In re Lowman, supra*, laid down for the first time the proposition that a person entitled to only a moiety could deal with it. *In re Davidson; Martin v. Trimmer; Davidson v. Trimmer* (1879), 11 Ch. D. 341, held that unless there is something so unequivocal that it amounts to an election by all concerned, so as to bring about a conversion, effect must be given to the trust. In this case there is no evidence of a positive act; no election was made. These principles are referred to in *In re Sturt; De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

R. D. Steele, K.C., for the executrices of Grace M. Richardson: This property should be sold and go into the trust fund, in which the Grace M. Richardson estate would share. The interest of Grace M. Richardson in the trust fund became absolutely vested on the death of Alexander Barr, and could not be divested. [HENDERSON J.A.: But there was then no trust fund.] Equity presumes everything to the done that ought to be done.

As to costs, we are in a dual position. We must have the Martha Richardson estate administered in order to deal with the Grace M. Richardson estate.

W. B. Williston, in reply.

Cur. adv. vult.

8th February 1951. HENDERSON J.A. agrees with LAIDLAW J.A.

LAIDLAW J.A.:—The appellant George Campbell Barr Richardson is the son of the late Martha Richardson, widow, who died on or about the 16th June 1924, leaving a last will and testament dated the 3rd March 1919, and is a brother of the late Mary Grace McGregor Richardson (usually referred to as Grace M. Richardson) who died on or about the 5th November 1948, leaving a last will and testament dated the 24th March 1944. The executrices and trustees named in the will of the late Grace M. Richardson made application to the Court pursuant to Rule 600 for the determination of certain questions (which I shall quote below) and for the opinion, advice and direction of the Court. The application came on for hearing before Smily J. and the appellant now appeals from the order made by him on the 26th June 1950.

The provisions of the will of the late Martha Richardson relative to the questions in controversy are as follows:

“5. I give to my Trustees hereinafter named, and the survivor of them, Lot Number Seventy-four on the West side of Inshes Avenue, in the City of Chatham, in the said County of Kent, according to registered Plan Number 244, upon the following trusts and for the following uses and purposes:—

“(a) To permit my said daughter, Mary Grace McGregor Richardson, to live therein and have the use and enjoyment thereof until her death or marriage, (whichever shall first happen), but with the right of my son, George Campbell Barr Richardson, to lodge with her therein and have the comforts of a home during the said period, he, however, to make proper compensation to my said daughter for his board while he lives and rooms on the premises, and his right to remain there shall cease upon her marriage.

“(b) Upon the death or marriage, (whichever shall first happen), of my said daughter, to absolutely sell and convert the said real estate into cash with all reasonable dispatch, but so as to obtain fair returns therefrom, with full right to my Trustees, or the survivor of them, to execute and deliver any and all necessary deeds or conveyances to effectuate and carry out any such sale; so as to vest in the purchaser or purchasers thereof the said real estate absolutely.

“(c) To pay out of the proceeds derived from such sale the costs, charges and expenses of and incidental to conversion thereof.

“(d) To carry the net proceeds therefrom into the trust fund hereinafter particularly referred to, for all the uses and purposes thereof.

“6. All the rest and residue of my estate and property, both real and personal, (of whatsoever kind and wheresoever situate), I give, devise and bequeath unto my said Trustees, and the survivor of them, upon the trusts, however, and for the following uses and purposes only:—

“(a) To convert the same, or such part thereof as shall not then be in ready cash, into cash with all reasonable dispatch after my decease, and for such purpose I hereby give my said Trustees, and the survivor of them, full power to make sale, en bloc or in parcels or otherwise, as to them or the survivor shall be deemed fit and proper, and with like power to execute and deliver any and all necessary deeds or conveyances, to effectuate and carry out the conversion hereby directed.

“(b) To pay thereout the costs, charges and expenses of and incidental to such last mentioned conversion.

“(c) To invest and keep invested from time to time the net proceeds thereof, (hereinafter called the ‘Trust Fund’) in securities authorized by the Law of the Province of Ontario for the investment of trust moneys such sum, however, thereof to be kept from time to time in cash to the credit of an interest-bearing account in some chartered Bank in the City of Chatham, sufficient at all times to have available for easy and prompt payment, according to the provisions hereinafter made for the benefit of my Brother, Alexander Barr.

“(d) To pay out of the interest to arise from such trust fund such sum and sums as, in the discretion and opinion of my Trustees, or the survivor of them, may be reasonably required to provide my brother Alexander Barr, with suitable board and lodging, suitable clothing, medicine and medical attendance, according to his station in life, during his lifetime, and pocket money, (but only to such extent as they may, in their discretion, see fit), suitable to his station in life.

“The moneys aforesaid to be so expended for and on behalf of my said brother are to be personally paid out by said

Trustees, or the survivor of them, directly to the persons immediately entitled thereto, and not through or by the hand of my said brother.

“(e) Upon the death of my said brother, Alexander Barr, the trust fund shall then be wholly converted into cash, and, after payment thereout of the costs, charges and expenses appertaining to such last mentioned conversion, and the administration of the trusts by this my will created, the remainder shall be divided equally share and share alike, between my said son and daughter, should they then be both living.

“Should either of them predecease my said brother, without leaving issue or descendants him or her surviving, then the remainder of the said trust fund shall be paid over to the one of my said children so surviving, absolutely.

“Should either my said son or daughter predecease my said brother leaving issue or descendants him or her surviving, then such remainder shall be divided into two equal parts, one of which shall be paid to the survivor of my said children, and the other shall go to the issue or descendants of the one who predeceased my said brother, the division as among such issue or descendants to be in equal parts or shares.

“7. All the rest and residue of my estate and property not hereinbefore disposed of, I give, devise and bequeath unto my said son and daughter absolutely, in equal shares.”

At the time of her death, Martha Richardson left surviving her Grace M. Richardson, George C. B. Richardson (the appellant), and her brother Alexander Barr.

Alexander Barr died in the year 1926 and so far as appears from the material before this Court, no trust fund as contemplated by clause 6 of the will of Martha Richardson was ever established. It does not appear that any residue of her estate was available to enable the trustees to carry out that part of her will.

Grace M. Richardson and her brother George C. B. Richardson resided together at 44 Inshes Avenue (lot 74 as described in the will of Martha Richardson) from the time of Martha Richardson's death until the death of Grace M. Richardson on or about the 5th November 1948.

The will of Grace M. Richardson appoints Pearl Wilson and Alice E. Trotter executrices and trustees and contains the following clauses:

"I give and bequeath unto my brother, George C. B. Richardson of 44 Inshes Ave., Chatham, Ont. my equity in home at 44 Inshes Ave., Chatham, Ont. outright for his sole use, and to do whatever he chooses with it. . . .

"Balance of residue in my estate and any further money coming to me from the M. R. Backus Estate, I direct to be divided into three equal parts and divided between my brother, Geo. C. B. Richardson, my friend, Alice E. Trotter and my God-daughter, Jocelyn Foster, share and share alike."

The questions submitted to the Court by the executrices of the will of Grace M. Richardson and the answers made thereto are as follows:

"1. Should the property described as Lot #74 on the west side of Inshes Avenue in the City of Chatham in the County of Kent according to registered Plan #244 referred to in Paragraph #5 of the last Will and Testament of Martha Richardson, Deceased, be sold, Mary Grace McGregor Richardson, now having died?" A. Yes.

"2. Is the estate of Grace M. Richardson entitled to take one-half of the proceeds of sale of said real estate?" A. No, "except in so far as the said estate of Grace M. Richardson is entitled to receive one-half of the trust fund set up by the Last Will and Testament of the said Martha Richardson, deceased, into which the proceeds of the sale of such real estate are to be paid".

"3. Did the said Grace M. Richardson at the time of her death, have any interest or equity in the said real estate?" A. No.

"4. Does the last Will and Testament of the said Grace M. Richardson convey any interest or equity she might have in said real estate to George C. B. Richardson?" A. No.

"5. Does the Will of the said Grace M. Richardson, Deceased, give any right to any part of the interest of the said Grace M. Richardson in the trust fund set up by Last Will and Testament of the said Martha Richardson, Deceased, to George C. B. Richardson?" A. No, "except in so far as the said George

C. B. Richardson is entitled to an interest in the residue of the Estate of Grace M. Richardson”.

“6. Should the interest of Grace M. Richardson in the trust fund set up in the last Will and Testament of the said Martha Richardson, Deceased, go into the residue of the estate of the said Grace M. Richardson and be dealt with as provided for in the last Will and Testament of the said Grace M. Richardson?” A. Yes.

The appellant rests his appeal on the following grounds:

“1. That the learned Judge erred in holding that the property described as lot number 74 on the West side of Inshes Avenue, in the City of Chatham, in the County of Kent, should be sold when it appeared that Alexander Barr pre-deceased Grace M. Richardson, that the need or purpose of the conversion directed by the Will of Martha Richardson had failed and that George C. B. Richardson is the only person who now has any interest in the said property.

“2. That the learned Judge erred in holding that the said Mary Grace McGregor Richardson had no interest or equity in the said property.

“3. That the learned Judge erred in failing to give effect to the intention of the Testatrix Grace M. Richardson and in particular in failing to hold that the will of the said Testatrix conveyed the interest or equity she had in the said property to George C. B. Richardson.

“4. If the said property is considered in equity as having been converted into money then the Will of Grace M. Richardson showed an intention or election to re-convert it to realty.”

The respondent Alice E. Trotter, in her personal capacity as one of the residuary beneficiaries under the will of Grace M. Richardson, appearing in this court by counsel, submitted that Grace M. Richardson had no “equity” or estate in the property in question which she could devise by will; that she had a life estate only but she had a vested interest in the trust fund which was to be set up under the will of Martha Richardson and which was to include the net amount received by the trustees from the conversion of the real property now in question. It was contended on her behalf that upon the death of Alexander Barr both Grace M. Richardson and George C. B. Richardson became entitled to share equally in the “trust

fund" and the estate of Grace M. Richardson is entitled to share "in whatever has become, or becomes, a part of the said trust fund".

Counsel for the Official Guardian, representing Jocelyn Foster, the infant beneficiary under the residuary clause in the will of Grace M. Richardson, supported the judgment of Mr. Justice Smily.

It is apparent, at once, that the rights of the late Grace M. Richardson and the trustees of her estate and the beneficiaries of her estate in respect of the property in question have their source and depend upon the contents and construction of the will of the late Martha Richardson. I examine the whole of that will without regard, at the moment, for any rules of construction or principles of law and endeavour therefrom to ascertain the intention of the testatrix. She had in mind only three beneficiaries, her two children Grace M. Richardson and George C. B. Richardson and her brother Alexander Barr. She wanted to provide a home for both of her children during the lifetime of her daughter. She had in mind also the possibility that her daughter might marry and in that event might no longer require or desire to continue in any place of residence provided for her by her mother's will. Therefore it was her intention, as disclosed from the language of the will, to give to her daughter an estate for her life, or until her marriage, in the property described in the will as lot 74 on the west side of Inshes Avenue, in the city of Chatham, and to give to her son the right to lodge there during the lifetime of his sister or until her marriage, on condition that he made proper compensation for his board. There was no intention to devise to Grace M. Richardson any estate in the property which she could dispose of during her lifetime or by her will. Therefore, in my opinion, the clause in the will of Grace M. Richardson under which she purports to give and bequeath her equity in that property to George C. B. Richardson "for his sole use and to do whatever he chooses with it" is void and without any legal effect whatsoever.

In addition to providing a home for her children in the manner described, Martha Richardson gave each of them a legacy of \$5,000 to be paid within one year after her death.

After providing for those legacies and for a home for her children after her death, she turned her attention to her brother. She had in her mind a plan for his maintenance and for payment to him of "pocket money" during his lifetime. Her trustees were to set up a trust fund which she stated explicitly was for the benefit of her brother. The purpose of that trust fund was to provide her brother with "suitable board and lodging, suitable clothing, medicine and medical attendance, according to his station in life". The moneys to be expended for that purpose were to be paid "directly to the persons immediately entitled thereto, and not through or by the hand of my said brother". The trustees were empowered in the exercise of their discretion to pay her brother sums for "pocket money . . . suitable to his station in life". The "trust fund" which the testatrix planned for her purpose was to be established from the residue of her estate remaining after providing legacies and a home for her children in the manner described.

The one and only purpose of the trust fund, as stated, was to provide maintenance and "pocket money" for Alexander Barr during his lifetime. When the testatrix came to dispose of the remainder of the trust fund upon the death of Alexander Barr, she had in mind the distribution at that time of the net proceeds of the fund as it then existed in fact and she did not contemplate or anticipate that there would be any occasion thereafter for another distribution. The trust was to be fully ended upon the death of Alexander Barr. If her trustees had proceeded in accordance with the provisions of her will they would have distributed the remainder, if any, of the trust fund upon the death of Alexander Barr in equal shares between Grace M. Richardson and George C. B. Richardson. The trustees would thereupon have been free from the trust imposed upon them in respect of the residue of the estate and would not have been under a continuing duty as trustees in anticipation of an addition to the trust fund upon the marriage or death of Grace M. Richardson.

It is my view that the language of the whole will of Martha Richardson and the intention disclosed therefrom did not require or permit the conclusion that there was an equitable conversion of the real property in question. To reach that conclusion, by the application of rules or principles, would result

in a diversion of part of the assets of the estate of the deceased in a direction which she did not intend. Only three persons were beneficiaries under her will and it was her intention that upon the death of Alexander Barr and Grace M. Richardson her son George C. B. Richardson should be the sole beneficiary of the remainder of her estate. In the absence of a provision in the will against the event of the death of Alexander Barr before the marriage or death of Grace M. Richardson, there was, in my opinion, an intestacy as to the remainder of the estate in the property in question after the death of Grace M. Richardson. George C. B. Richardson is the sole surviving heir-at-law of the testatrix and is entitled to the whole of the net proceeds derived by the trustees after the sale and conversion of the property as directed in the will. The Court should not, in such circumstances, compel a conversion against the will of the beneficial owner. I think it is competent for George C. B. Richardson to elect to take the property in its original character and the trustees of the property should transfer the title of it to him: *Lewin on Trusts*, 14th ed. 1939, p. 812; *Re Gardner's Trusts* (1853), 1 Eq. Rep. 57; *Mutlow v. Bigg* (1875), 1 Ch. D. 385.

It remains to mention more particularly the interest of Grace M. Richardson in the trust fund which was to be established under the will of Martha Richardson. She became entitled, in my opinion, to an equal share of the net proceeds, if any, of that trust fund, which was to be established by the trustees from the residue of the estate, and the extent of her interest therein should be determined by the amount of the fund in fact existing upon the death of Alexander Barr. The real property in question did not add anything to her interest in the trust fund in the particular circumstances of the case. She made no specific disposition by her will of her share of the net proceeds of the trust fund and it fell into the residue of her estate, which was to be divided into three equal parts among George C. B. Richardson, Alice E. Trotter and Jocelyn Foster. Therefore George C. B. Richardson is entitled to one-third of the interest of Grace M. Richardson in the trust fund which the trustees of Martha Richardson were to set up from the residue, if any, of her estate.

In accordance with the views I have expressed, I would answer in the negative each of the first four questions submitted to the Court by the executrices and trustees of the estate of Grace M. Richardson. I would answer questions 5 and 6 in the affirmative.

The order of Mr. Justice Smily should be amended accordingly.

I would allow the costs of all parties, in this court and in the court below, to be paid from the estate of Grace M. Richardson, the costs of the executrices on a solicitor-and-client basis.

HOGG J.A. (*dissenting in part*):—This is an appeal from a judgment of Mr. Justice Smily upon an application which involved the interpretation and construction of portions of the will of the late Martha Richardson, deceased, who died on the 16th June 1924, and of the will of a daughter of Martha Richardson, the late Grace M. Richardson, who died on the 5th November 1948.

A motion was made on behalf of Pearl Wilson and Alice E. Trotter, executrices of the last will of Grace M. Richardson, in which the advice and direction of the Court was requested for the determination of certain questions which had arisen in connection with the administration of her estate. This appeal is brought by George C. B. Richardson, a son of Martha Richardson and a beneficiary under both wills.

Upon the first reading of the will of Martha Richardson the problem of arriving at its proper meaning and its true construction appeared to be one of very considerable difficulty, but after a careful consideration of the matter the solution of the problem presented by the questions asked upon the application does not seem as formidable or as onerous as at the outset.

It was argued by counsel for the appellant that he is entitled, under the terms of the aforesaid wills, to have conveyed to him after the death of Grace M. Richardson, a certain real property known as lot 74 on the west side of Inshes Avenue, situated in Chatham, Ontario, devised by Martha Richardson to Grace M. Richardson for use during the latter's lifetime.

After directing that her debts and testamentary expenses be paid, and after giving certain specific legacies, Martha Richardson, by the subsequent terms of her will, gave to the trustees

named in her will the aforesaid lot 74 on the west side of Inshes Avenue, in the city of Chatham, upon certain trusts, *inter alia* [see clause 5, paras. a, b, c and d, set out by LAIDLAW J.A., *supra*].

The will sets out that all the rest and residue of the testatrix's estate, not previously disposed of, is devised and bequeathed unto the testatrix's said son and daughter, in equal shares.

Alexander Barr died in or about the year 1926 and both George and Grace Richardson were living at the time. The trust fund provided by the will has never been set up.

The following provision is found in the will of Grace M. Richardson: "I give and bequeath unto my brother, George C. B. Richardson of 44 Inshes Ave., Chatham, Ont., my equity in home at 44 Inshes Ave., Chatham, Ont., outright for his sole use, and to do whatever he chooses with it." The residence 44 Inshes Avenue is situated upon the said lot 74.

It is contended on behalf of George C. B. Richardson that because a half-interest in the proceeds of the sale of the above-mentioned residence had been given to him by his mother's will and as he had obtained under the will of his sister Grace her half-interest in the property, he is, therefore, entitled to elect to take the actual land and building thereon as it stands, since it has not yet been sold.

The learned judge who heard the motion concluded that the property on Inshes Avenue should be sold and the interest of Grace M. Richardson in the trust fund which was directed to be set up by the will of Martha Richardson, and into which fund the proceeds of the sale of the said property should be paid, should be dealt with according to the provision of the will of Grace M. Richardson with respect to the residue of her estate. With this disposition I agree.

I am of the opinion that the only benefit or advantage Grace M. Richardson had in the aforesaid real estate was the right to use it during her life or while she remained unmarried and that there was no interest or so-called equity in this real property vested in Grace M. Richardson which she could devise by her will. However, although Grace M. Richardson had no interest in the house on Inshes Avenue *qua* real estate which she could devise by will, she had an interest in the proceeds derived from the sale of this real property.

Martha Richardson's will further provided that upon the death of Alexander Barr, which occurred in 1926, the net amount remaining of the trust fund set up by the will was to be divided in equal shares between the testatrix's children George and Grace.

In my opinion, the principle enunciated by the Judicial Committee of the Privy Council in *Browne v. Moody et al.*, [1936] A.C. 635, [1936] 2 All E.R. 1695, [1936] O.R. 422, [1936] 4 D.L.R. 1, should be applied to the facts presented in this case, and therefore the proceeds of the conversion of the assets of the estate of the testatrix Martha Richardson, whether in the form of cash or securities, which formed or were intended eventually to form the whole of the trust fund to be set up by the terms of Martha Richardson's will, and whether part of these assets were to be converted after the death of Martha Richardson and another part, namely, the house property, was to be converted after the death of Grace M. Richardson, were vested in her son and daughter, George and Grace M. Richardson, immediately upon the death of Martha Richardson on the 16th June 1924, but the division of this fund, or the proceeds of the conversion which were to constitute the trust fund, was to be postponed to a future date. The proceeds of the conversion of the residue of the estate of Martha Richardson, apart from the real property on Inshes Avenue in Chatham, were to be divided upon the death of Alexander Barr. The proceeds of the sale of the real property could not be divided until the termination of the life estate in it, that is to say, until the death of Grace M. Richardson.

“ . . . money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted”: Jarman on Wills, 7th ed. 1930, p. 726.

The vested interest of Grace M. Richardson of a share amounting to one-half the whole of the intended trust fund provided by Martha Richardson's will, or the cash and securities which were to form such fund, and which included the proceeds from the sale of the house, formed part of the residue of her estate and by her will she directed that such residue should be divided in equal shares between her brother George and Alice E. Trotter and Jocelyn Foster.

I think that the appeal should be dismissed and the answers given to the questions asked on this application by Mr. Justice Smily affirmed, except that it seems to me that the answer to the fifth question set out in the notice of motion should be in the affirmative rather than in the negative with the exception or proviso thereto which forms part of the answer. This fifth question seems hardly necessary in view of the answer in the affirmative on the sixth question.* A third part of the residue of the estate of Grace M. Richardson goes by her will to her brother George.

The costs of the appeal should be to all parties, one-half out of each estate, those of the executrices of the will of Grace M. Richardson to be as between solicitor and client.

*Judgment varied, HOGG J.A.
dissenting in part.*

Solicitors for the appellant: McKinnon & Clare, Guelph.

Solicitors for Alice E. Trotter, respondent: Chunis & Kee, Chatham.

Solicitors for the executrices: Steele, Perkins & Ward, Chatham.

*For the text of questions 5 and 6, here omitted, see reasons of LAIDLAW J.A., *supra*.

[COURT OF APPEAL.]

Re Going.

Wills — Legacies — Conditions — Membership in Protestant Church — Alternative Gift — Immateriality, in Case of Condition Precedent, of Validity or Invalidity of Condition.

A testatrix directed her executors to set up a fund to be accumulated until 1950 and then to be divided between two nephews, "but only in the event of their being members and adherents in good faith and standing in a Protestant Church". She further provided: "if neither of my said nephews are such members of a Protestant Church when said period has arrived, then I give and bequeath the whole of said fund to the Pension Fund of the United Church of Canada". The nephews were both of age in 1950, and neither of them was a member of a Protestant Church.

Held, the whole fund should be paid to the Pension Fund of the United Church of Canada. The condition was clearly a condition precedent, and it was plainly the testatrix's intention that if the gift to the nephews failed the whole fund should go to the pension fund. It was unnecessary to determine whether or not the condition was valid. If it was invalid, then the gift to the nephews failed entirely, under the principle stated in *Re Gross*, [1937] O.W.N. 88 at 91. On the other hand, if the condition was valid the gift failed equally because neither of the nephews had complied with it.

AN APPEAL from the judgment of McRuer C.J.H.C., [1950] O.W.N. 714, [1950] 4 D.L.R. 652.

6th and 7th December 1950. The appeal was heard by LAIDLAW, ROACH and GIBSON JJ.A.

J. J. Robinette, K.C., for the appellants: Our submission is that the condition annexed by the testatrix to her gift is void on the ground of public policy and, alternatively, for uncertainty.

The clause in the will should not be interpreted to mean that the condition might be complied with at any time in the year 1950. It is true that payment might be made in that year in the ordinary course of administration, but, in relation to vesting or divesting, the condition, if valid, had to be complied with at the beginning of 1950, since the testatrix said "if neither of my said nephews are such members of a Protestant Church *when said period has arrived*", and the only "period" referred to is "the year 1950". The condition was therefore clearly void as to Brian Michael Bradley, because it was operative entirely during his infancy; as to John David Bradley also it operated in part during his infancy. The condition is therefore bad as tending to influence the infants' parents to regard their worldly welfare in educating them. Any gift to an infant, payment of which depends upon his following a particular religious persuasion, is void on the ground of public policy because it tends to interfere with the duty of parents to instruct their children in religious

matters solely with a view to their moral and spiritual welfare, uninfluenced by mercenary considerations affecting the infants' worldly welfare: *In re Borwick*; *Borwick v. Borwick*, [1933] Ch. 657 at 666; *Re Tegg*; *Public Trustee v. Bryant*, [1936] 2 All E.R. 878. It is true that in *In re Borwick* the condition was a condition subsequent, but this is immaterial where the question is one of public policy.

If the condition is void, the gift to the nephews stands unimpaired by the condition, whether it be considered precedent or subsequent: *Re Hamilton* (1901), 1 O.L.R. 10 at 11.

In the alternative, the condition is void for uncertainty. Church records would show if the infants were "members" of a Protestant Church, but the testatrix required more than mere membership; she wished them to be "adherents in good faith", and no one can say with any degree of precision what these words mean. The test specified is subjective rather than objective; it requires emotional good faith on the part of the recipients. I rely on *Clavering v. Ellison et al.* (1895), 7 H.L. Cas. 707 at 725, 11 E.R. 282; *Sifton v. Sifton et al.*, [1938] A.C. 656 at 670, [1938] 3 All E.R. 435, [1938] O.R. 529, [1938] 3 D.L.R. 577, [1938] 2 W.W.R. 465; *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16; *In re Borwick*, *supra*; *Re Tegg*, *supra*. Although these cases all deal with conditions subsequent, the doctrine of uncertainty is not limited, but applies to any condition having to do with the enjoyment of property. In *Re Starr*, [1946] O.R. 252, [1946] 2 D.L.R. 489, it was held that the condition was sufficiently certain, but this case is closer to *Re Tegg* than to *Re Starr*. It is an ambiguous requirement. I also refer to the unreported judgment of the Supreme Court of Canada in *Re Noble and Wolf* [since reported, *sub nom. Noble and Wolf v. Alley et al.*, [1951] 1 D.L.R. 321].

[LAIDLAW J.A.: It seems clear that the testatrix did not intend either nephew to have the money unless he was a member of a Protestant Church. If we give the money to either, are we not doing what she did not intend?] The intention of the testatrix must be disregarded if it violates a rule of law, such as public policy.

Although it is immaterial to either of my arguments whether this condition is to be regarded as precedent or subsequent, since it is invalid in either event, I submit that it is really a con-

dition subsequent. The gift is vested, and the operation of the condition would have a divesting effect so far as the nephews are concerned, although it may operate as a condition precedent as to the Pension Fund. The testatrix did not stipulate that either nephew was to be alive in 1950. Their interest was vested, subject to being divested. [ROACH J.A.: Were there not two conditions, (1) that they be alive, and (2) that they be of the Protestant faith?] In any case, the gift is one of personalty, and it does not matter whether it is a condition precedent or a condition subsequent: *McKinnon v. Lundy* (1893), 24 O.R. 132 at 139, varied 21 O.A.R. 560, which was reversed, 24 S.C.R. 650 (*sub nom. Lundy et al. v. Lundy*).

A. T. Whitehead, K.C., for the United Church of Canada, respondent [directed by THE COURT that he need not argue that the condition was a condition precedent]:—The condition can be deemed contrary to public policy only if the words “until the year 1950” and “when such period has arrived” are restricted so as to refer only to 1st January 1950. As to the general doctrine of construction, I refer to Jarman on Wills, 7th ed. 1930, p. 428. The word “until” must be given a meaning that will not defeat the testatrix’s intention: *Proudman v. Mellor et al.* (1859), 4 H. & N. 122, 157 E.R. 782; *Rex v. Stevens and Agnew* (1804), 5 East 244, 102 E.R. 1063; *Kerr v. Jeston* (1842), 1 Dowl. N.S. 538 at 539. The testatrix knew that both nephews would be of age in 1950; they could then make their choice, and have the money in 1950. [GIBSON J.A.: What would be the position if they ceased to be adherents before the end of 1950?] Having qualified, they could demand their money. [LAIDLAW J.A.: They could not demand it in 1950 if the duty of the executors was to maintain the fund until the end of 1950.] If, being the only beneficiaries of the trust, they qualified, I suggest that the trust might be extinguished. The testatrix used the word “period”, not “date”, indicating that she had in mind more than one particular date. [ROACH J.A.: Do you say that para. 5 can be construed as directing the executors to accumulate the fund until the beginning of 1950, and then giving them the whole of 1950 in which to distribute, and do you say further that “when said period has arrived” refers to the time of distribution?] Yes.

The words are not uncertain. They were apparently understood perfectly by the nephews who, through their solicitors, and using the exact words of the will, informed the executors by letter that they did not qualify for the bequest. In any case, if the condition is uncertain, then, since it is a condition precedent, the gift to which it is attached fails, and the gift over takes effect. [ROACH J.A.: I think it is an alternative gift, rather than a gift over.] [LAIDLAW J.A.: It is operative if the condition is certain and the gift fails; but if we cannot determine the event in which the Pension Fund becomes entitled, then the whole clause fails.]

Where there is a condition precedent that cannot be fulfilled, the gift fails and the gift over takes effect: *In re Moore; Trafford v. Maconochie* (1888), 39 Ch. D. 116 at 129; *In re Borwick; Borwick v. Borwick*, [1933] Ch. 657; *In re May; Eggar v. May*, [1932] 1 Ch. 99 at 113; *Patton v. Toronto General Trusts Corporation et al.*, [1930] A.C. 629 at 636, 39 O.W.N. 5, [1930] 4 D.L.R. 321, [1930] 2 W.W.R. 1; *Re Starr*, [1946] O.R. 252, [1946] 2 D.L.R. 89; *Re Hamilton* (1901), 1 O.L.R. 10.

R. F. Wilson, K.C., for the executors, submitted his clients' rights to the Court. He referred to 34 Halsbury, 2nd ed. 1940, pp. 104, 105, 107.

J. J. Robinette, K.C., in reply: If a condition precedent attached to a gift of personalty is void, the validity of the gift is not affected by the condition: *Re Hamilton, supra*. *In re Moore, supra*, is really an authority in support of my argument.

Cur. adv. vult.

8th February 1951. The judgment of the Court was delivered by

LAIDLAW J.A.:—This is an appeal by John David Bradley and Brian Michael Bradley, nephews of the late Ambia Lila Going, deceased, from a judgment of the Chief Justice of the High Court dated the 13th September 1950, determining certain matters arising from her last will and testament dated the 9th December 1936.

Paragraph 5 of the will is as follows:

"I DIRECT my executors to set apart and invest the sum of Five Thousand Dollars in cash or its equivalent in trustee securities and to allow the principal and interest to accumulate until the year 1950, and at that date to divide the whole amount

equally between my two nephews, but only in the event of their being members and adherents in good faith and standing in a Protestant Church and in the event of one only of my nephews being such a member of a Protestant Church then the whole amount shall be paid him, but if neither of my said nephews are such members of a Protestant Church when said period has arrived, then I give and bequeath the whole of said fund to the Pension Fund of the United Church of Canada."

John David Bradley attained the age of 21 years on 27th June 1948, and Brian Michael Bradley on 14th March 1950. It is admitted that they are the two nephews of the testatrix referred to in para. 5 of the will quoted above.

It is not now suggested that either of her nephews has complied with the condition annexed to the gift made to them by para. 5 of the will of the testatrix. The contention of counsel on their behalf is that the condition is void on the ground of public policy "since it tended to divert [their] parents from their duty to instruct their children in religious matters solely with a view to the moral and spiritual welfare of the children uninfluenced by mercenary considerations affecting the infants' worldly welfare". Reference is made to *In re Borwick*; *Borwick v. Borwick*, [1933] Ch. 657 at 666; *Re Tegg*; *Public Trustee v. Bryant*, [1936] 2 All E.R. 878. In the alternative it is contended that the condition "being members and adherents in good faith and standing in a Protestant Church" is void on the ground of uncertainty. Reference is made to *Clavering v. Ellison et al.* (1859), 7 H.L. Cas. 707 at 725, 11 E.R. 282; *Sifton v. Sifton et al.*, [1938] A.C. 656 at 670, [1938] 3 All E.R. 435, [1938] O.R. 529, [1938] 3 D.L.R. 577, [1938] 2 W.W.R. 465; *Clayton et al. v. Ramsden et al.*, [1943] A.C. 320, [1943] 1 All E.R. 16; *In re Borwick, supra*; *Re Tegg, supra* at p. 881; *Murray et al. v. Dunn et al.*, [1907] A.C. 283; *Noble and Wolf v. Alley et al.*, [1951] 1 D.L.R. 321.

Counsel then argues that "if the condition is void the gift to the infants stands unimpaired by the condition, whether the condition is considered to be precedent or subsequent". He relies in support of his argument on *Re Hamilton* (1901), 1 O.L.R. 10 at 11.

The condition now under consideration is clearly a condition precedent, and in my opinion the present case falls squarely

within the principle discussed by Middleton J.A., giving the judgment of the Court of Appeal, in *Re Gross*, [1937] O.W.N. 88 at 91, as follows:

"It is argued that this condition is void as offending against the rules concerning public policy as tending to interfere unduly with parental rights and obligations. The Court is not concerned with the validity of this contention because the law is quite plain that, if the condition is a condition precedent, the gift cannot prevail if the condition is void. As long ago as the days of Coke upon Littleton and Shephard's Touchstone it was laid down that, if a gift is made to take effect only upon some particular event, there is no gift unless the condition is fulfilled, and it makes no difference that the event is impossible in itself or impolitic or illegal, and this law has not since been qualified in any way that is now material. If it is necessary to refer to the modern law, reference may be made to the decision of a very strong Court of Appeal in *In re Wallace*, [1920] 2 Ch. 274. There the precise question was widely different from that now under consideration, but there is a clear statement of this principle by Lord Sterndale, at p. 281: 'This condition is clearly a condition precedent and in that case if a condition be void as against public policy, the gift fails'."

It is plain to me from the language of the will that it was the intention of the testatrix that if the gift to her nephews failed the whole of the fund to be set aside by her executors under para. 5 of her will should go to the Pension Fund of The United Church of Canada. Thus, if the gift to the nephews fails because the condition annexed to it is void, as contended by their counsel, the Pension Fund of the United Church of Canada is entitled to it. If the condition is a valid one, the fund likewise goes to that beneficiary because neither of the nephews of the testatrix has complied with the condition and the time permitted for doing so has passed.

While I have found it unnecessary to decide the question as to the validity of the condition annexed to the gift, I mention the following two cases which I examined, namely, *In re Millar Estate*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, and *Re Curran*, [1939] O.W.N. 191.

My opinion and conclusion is that the appeal fails and should be dismissed with costs of all parties to be paid out of

the estate forthwith after taxation thereof, the costs of the executors to be taxed as between solicitor and client.

Appeal dismissed.

Solicitors for the appellants: Dawson and Nethery, Sarnia.

Solicitor for the United Church of Canada, respondent: A. T. Whitehead, Toronto.

Solicitors for the executor: Wilson, Thomson & Macdonald, Windsor.

[COURT OF APPEAL.]

Re Kenny.

Husband and Wife—Summary Proceedings for Maintenance—Enforcement of Maintenance Order Made in Different Province—Jurisdiction of Original Magistrate—Resident of Ontario—The Maintenance Orders (Facilities for Enforcement) Act, 1948 (Ont.), c. 53 (The Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950, c. 334), ss. 2, 3, 4.

An order for maintenance made by a magistrate in British Columbia against a resident of Ontario, who has not appeared before the magistrate or in any way submitted to his jurisdiction, is a nullity, and cannot be enforced in Ontario under s. 2 of The Maintenance Orders (Facilities for Enforcement) Act, 1948. Sections 3 and 4 of that Act (and ss. 5 and 6 of a corresponding statute of British Columbia) provide a special procedure for the case of a non-resident, but they do not give jurisdiction to a magistrate to issue an ordinary summons against a resident of another Province, to cause the summons to be served in that other Province, or to proceed in the absence of the non-resident.

Where it is sought to enforce in Ontario a maintenance order made by a magistrate in another Province, and the jurisdiction of that magistrate is questioned, the magistrate in Ontario has no option but to determine the question.

AN APPEAL by Earl Robert Kenny from an order of Smily J., [1950] O.W.N. 339, dismissing an application for an order expunging the registration in Ontario of an order for maintenance made in British Columbia, and for other relief.

11th September 1950. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and GIBSON JJ.A.

M. T. Fram, for Earl Robert Kenny, appellant: The magistrate in British Columbia had no jurisdiction to make an order for maintenance against a resident of Ontario. [ROBERTSON C.J.O.: It is of fundamental importance to know by what authority the summons was served on the appellant in Ontario.] [LAIDLAW J.A.: If no order was made permitting service in

Ontario, perhaps everything else is void; such an order should appear in the record.]

There is a distinction between the making of an order in a foreign jurisdiction and its enforcement in Ontario. The order can be good only if the statute has been complied with. There is a procedure available for such a situation as this in The Maintenance Orders (Facilities for Enforcement) Act, 1948 (Ont.), c. 53, and the statute of the same name, R.S.B.C. 1948, c. 198. Section 4 of the British Columbia statute, under which the magistrate purported to act, is restricted to cases where a maintenance order has been made against a person while he is within the jurisdiction, and he subsequently becomes a resident of a reciprocating State: 10 Halsbury, 2nd ed. 1933, p. 826. Section 5 sets out the procedure to be adopted when the person against whom the order is sought is at the time resident in a reciprocating State, and this was the only procedure available to the magistrate if he wished to make an order enforceable outside British Columbia. Under s. 5 the order is provisional only, and has no effect outside the Province unless and until it is confirmed by a Court in the reciprocating State, and this is an exclusive, not an alternative, procedure. The word "may" in s. 5 refers to the discretion of the magistrate to make or refuse an order, and not to the choice of procedure he may adopt.

For the magistrate in Ontario to refuse to hear evidence tendered by us amounted to a denial of natural justice: *Re Bushell v. Moss* (1886), 11 P.R. 251.

As to the nature of the relief, the clerk of an inferior Court can be prohibited from taking any steps to enforce an order made in his court: *Re Phillips v. Hanna* (1902), 3 O.L.R. 558; *Clifford v. O'Sullivan*, [1921] 2 A.C. 570 at 586.

E. H. Silk, K.C., for the judge and clerk of the Family Court at Hamilton, respondents: The magistrate in British Columbia, in making his order, did not act under s. 4 or any other section of that Province's Maintenance Orders (Facilities for Enforcement) Act. He proceeded, quite properly, under The Deserted Wives' and Children's Maintenance Act, R.S.B.C. 1948, c. 93, until after he made the order. He was not bound, merely because the husband resided out of the jurisdiction, to proceed under the former statute. It is designed simply to facilitate enforcement, and does not purport to replace other procedures and remedies. It was

entirely within the discretion of the magistrate how he would proceed, and he was justified in making an absolute order.

The principle of The Maintenance Orders (Facilities for Enforcement) Act governing the registration of final orders made in reciprocating States must be distinguished from the principles prescribed in Reciprocal Enforcement of Judgments Acts. Common law principles applicable to the enforcement of foreign judgments are not applicable under s. 2 of The Maintenance Orders (Facilities for Enforcement) Act.

The proceedings before the British Columbia magistrate are not before this Court. It must be assumed that everything was done that was necessary to give him jurisdiction to proceed. [ROBERTSON C.J.O.: Courts of inferior jurisdiction must show the existence of their jurisdiction.] The magistrate had jurisdiction notwithstanding that the appellant did not reside in British Columbia, and he had authority to order service of the summons outside the Province: The Deserted Wives' and Children's Maintenance Act (B.C.), s. 2; *Gagen v. Gagen*, 48 B.C.R. 481, [1934] 3 W.W.R. 84, [1934] 4 D.L.R. 409, 62 C.C.C. 286. The appellant admitted in his notice of motion for leave to appeal that an order for service in Ontario was made.

[LAIDLAW J.A.: The appellant had no reasonable opportunity to defend himself. It appears a very unfair situation.] His remedy is in the British Columbia Courts.

T. J. McKenna, for Margaret Estella Kenny, respondent:— If the appellant wishes to attack the jurisdiction of the British Columbia magistrate he should do so in the Courts of that Province. [ROBERTSON C.J.O.: Why should he be put to that expense?] Because that is the situs of the proceedings. [ROBERTSON C.J.O.: He has lived in Ontario for years.]

LAIDLAW J.A.: We do not know whether the magistrate made an order for service of the summons in Ontario or not. The maintenance order is clearly not valid in Ontario if the summons was not properly served.] The magistrate had jurisdiction to make an order for service outside the Province: The Deserted Wives' and Children's Maintenance Act (B.C.), s. 2; *Gagen v. Gagen*, *supra*. The onus is not on us to prove that such an order was made; the appellant must prove that it was not made. [LAIDLAW J.A.: The definition of "magistrate" in s. 2 might give him jurisdiction to deal with the matter, but where is there

authority for him to order service of a summons on the resident of another jurisdiction?'] In *Gagen v. Gagen*, *supra*.

The magistrates in both Provinces have complied with their respective statutes. The British Columbia magistrate chose, as he was entitled to do, to adopt this absolute procedure. It may work a hardship, but the remedy must be in that Province, not here.

M. T. Fram, in reply: It is sufficient for the appellant to point to the absence from the record of the order for service outside British Columbia. The law is that a provisional order for maintenance, not an absolute one, must be made in a case such as this. The British Columbia magistrate must have had some authority to send the maintenance order to Ontario for enforcement, and that authority can be derived only from The Maintenance Orders (Facilities for Enforcement) Act. He did not comply with s. 5 of that Act, and s. 4 is not applicable to these circumstances.

Cur. adv. vult.

13th February 1951. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by Earl Robert Kenny from the order of Smily J., made on the 24th March 1950, whereby he dismissed the application of Earl Robert Kenny for an order expunging the registration in Ontario, under the provisions of The Maintenance Orders (Facilities for Enforcement) Act, 1948 (Ont.), c. 53, of an order made by A. M. Guinet, a stipendiary magistrate in and for the County of Westminster, Province of British Columbia, under the provisions of The Deserted Wives' and Children's Maintenance Act, R.S.B.C. 1948, c. 93, whereby the applicant, Earl Robert Kenny, was ordered to pay for the maintenance of his wife, Margaret Estella Kenny, and the maintenance of their infant son, Ralph Gordon Kenny, and for an order declaring that such order is of no effect within Ontario, and for other relief in respect of the order. This appeal from the order of Smily J. is taken pursuant to leave granted by Ferguson J.

On 23rd September 1949 a summons was issued in the Province of British Columbia by A. M. Guinet, stipendiary magistrate in and for the County of Westminster, directed to

"Earl Robert Kenny, Ontario Public Highways Department, Hamilton, Ontario", reciting that Kenny's wife, Margaret Estella Kenny, had made complaint under The Deserted Wives' and Children's Maintenance Act that he had deserted his wife and caused her to become destitute, and requiring Kenny to appear at the police court in the City Hall, City of Chilliwack, in the Province of British Columbia, on the 11th October 1949, before such magistrate as might then and there be present and show cause why he should not be ordered to pay to his wife a sum sufficient for her maintenance and for the maintenance of his infant children.

This summons was served upon Kenny at Hamilton, Ontario. He did not attend, nor was he represented upon the return of the summons, and in his absence an order was made on the 11th October 1949 by A. M. Guinet, the stipendiary magistrate who issued the summons, that, it appearing that the wife was entitled to the benefit of the statute, The Deserted Wives' and Children's Maintenance Act, the husband "do hereafter pay to his said wife for her maintenance and the maintenance of their infant child Ralph Gordon Kenny the sum of Twenty-five (\$25.00) a week, the first of such payments to be made on the 15th day of October, 1949, and that he also, on said date, in addition to the amount of the first payment, pay the sum of Fifty (\$50.00) Dollars for costs".

No payment having been made by the husband in accordance with the terms of this order, a certified copy of the order was sent to the Attorney-General for Ontario, who forwarded it to the judge of the Family Court at Hamilton, Ontario, where it was registered on 24th October 1949.

The proceeding taken before the judge of the Family Court at Hamilton was taken under s. 2 of an Act passed by the Legislative Assembly of the Province of Ontario in 1948, c. 53, entitled "The Maintenance Orders (Facilities for Enforcement) Act, 1948".* Section 2 is as follows:

"(1) Where a maintenance order has, whether before or after this Act comes into force, been made against any person by a court in a reciprocating state and a certified copy of the order has been transmitted by the proper officer of the recip-

*Now The Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950, c. 334.

rocating state to the Attorney General, the Attorney General shall send a certified copy of the order to the proper officer of a court in Ontario for registration, and on receipt thereof the order shall be registered and shall from the date of such registration be of the same force and effect, and, subject to the provisions of this Act, all proceedings may be taken on such order as if it had been an order originally obtained in the court in which it is so registered, and that court shall have power to enforce the order accordingly.

“(2) The court in which an order is to be registered shall, if the court by which the order was made was a court of superior jurisdiction, be the Supreme Court and, if the court was not a court of superior jurisdiction, be such court as is determined by the Attorney General.”

The judge of the Family Court at Hamilton issued a summons, dated 23rd November 1949, addressed to Earl Robert Kenny, commanding him to appear on Monday, 28th November 1949, before the judge of the Family Court at Hamilton, and show cause why he should not be committed to gaol for disobedience of the order for payment made in British Columbia. After a number of adjournments, in the course of which a preliminary objection was taken to the jurisdiction of the Family Court at Hamilton, an order was made, on the 12th January 1950, for the payment by the husband of \$150, and \$50 for costs, on or before 13th February 1950, and for imprisonment in default of payment.

At this stage of the proceedings notice was given of the motion, returnable before the presiding judge in chambers at Osgoode Hall, and heard by Smily J. For the purpose of this motion the judge of the Family Court made a return to the Registrar at Osgoode Hall of the papers in his hands, and there was filed with the Registrar the affidavit of Earl Robert Kenny used on the motion.

By the notice of motion the applicant asked, in addition to the expunging of the registration in Ontario of the order of the stipendiary magistrate in British Columbia and a declaration that such order was of no effect within Ontario, for an order prohibiting the clerk of the Family Court at Hamilton from taking any proceedings against the applicant to enforce the conviction made by the judge of the Family Court at Hamilton,

and for an order directing the judge of the Family Court to hear the matter upon its merits.

In his affidavit filed upon the motion the applicant deposed, among other matters, to the following: that he is employed by the Department of Highways as an engineer, and that he has made Ontario his home since 1934; that he was married to the complainant, Margaret Estella Kenny, in February 1930 at Moose Jaw, in the Province of Saskatchewan, where he resided with his wife for a period of six months; that on leaving Moose Jaw he and his wife resided in Assiniboia, in the Province of Saskatchewan, until the summer of 1932, when they moved to Cranbrook, British Columbia; that he resided there with his wife until in or about the month of November 1934; that in the month of November 1934 he accepted a position as an engineer with the Department of Highways for the Province of Ontario, and moved to Ontario; that by reason of the nature of the position, which entailed living on location and in bush camps, and by reason of the fact that his three children were quite young, he and his wife decided that she would continue to reside with the children in Cranbrook until such time as he could set up a permanent home for his wife and children in Ontario, at which time she and the children would join him in Ontario; that from the time he reached Ontario in November 1934 he worked at various places, such as Sudbury, and then at White River, until September 1936, during which period he and his wife continued to correspond regularly and were on amicable terms; that in March 1936 he paid a visit to his wife and children in British Columbia, at which time he told his wife it would soon be possible for her to move east with the children and join him in Ontario; that in or about the month of September 1936 he moved to Toronto, where he remained until 1938; that during this period he made several attempts to have his wife join him in Ontario, as he was then in a position, by reason of advancement in the Department of Highways, to provide a home for his wife and children; that his wife "gave only evasive replies and would not make a firm committal"; that in or about the month of January 1938 he moved to Englehart, Ontario, and in the early part of 1939 wrote a letter to his wife asking her to come to Ontario in the month of June to find a home for herself and their family; that he enclosed money for her ticket, and suggested

that she find a home and then return to British Columbia to bring the children. By a letter dated 13th March 1939, produced and marked as ex. "A" to the affidavit, his wife replied as follows:

"Dear Earl:—

"Rec'd your letter & money O.K. some time ago. The kiddies are fine. We sure are having swell weather, in another week it will be Spring. I guess you will be glad when it comes warmer weather, it is so cold down there. The baby is coming along fine. I am kept quite busy working out dance routines. We have great times at our lessons. I am teaching a few women friends and the kiddies. It is surprising how well Jerry & Earla play the piano now, I must start Ralphie soon. I sure would like to have some extra money to get the kiddies nice spring clothes. They soon need them.

"Well Earl it wouldn't be fair to you or myself to move down east in June as you say there has to be love. I do think a lot of you Earl, I always did, but I'm afraid it is to friendly. I'm sorry Earl but I guess neither of us can help it.

"I know you went East with the best in view but 5 years is a long time away, things can't help but change, we have both more or less lived our own lives since we have been married. I think people used to wonder at first but I think they think I'm divorced now. I never tell them anything. Earl I do hope you can be happy. I'm really sorry our marriage has turned out like this because it has been tough on both of us and marriages should be happy, and both working together which we have never done.

"Do you ever hear from your people now? Time sure goes fast, Ralph will be starting school next Fall. I hate to see him go because then he is a baby no longer, he is such a little pal around the house when the others are at school. Mother had a bad fall on the ice the other night, did not break any bones but got quite a bad shaking up. Times are pretty quiet here, Jerry has only been on half-time this last couple of months but business should begin to pick up soon, at least we hope so. Are you going to be at Englehart for much longer? Are you living right in town or have a camp out of town? I took a few snaps to-day, the first I have taken all Winter. Jerry is only 13 inches shorter

than I am and Earla is tall and slim but Ralphie is small for his age and is so fair, just like a lily, he would have made a handsome girl but he isn't a bit girlish, he is all boy and sure is full of the devil & is an awful tease but does it in a quiet way. Jerry and Earla are doing swell at school. They are swell looking too, none of them can be beat by any kiddies in Cranbrook and everybody says they always look so well cared for. Earla always says she is going to be a nurse when she grows up and Jerry wants to be an air pilot, he is just full of air planes & Ralphie always says he is going to be a doctor like Dr. Green. I wonder if they will change their minds when they grow up. One thing, I do hope they have a better chance than Jerry & I had but God knows it wasn't Mother's fault, she did all she could do for us.

"Well Earl I guess I will close now as it is midnight.

"Margaret.

"P.S. Wrote this a long time ago as you see by the date it is the 1st. day of Spring today and it is just lovely out, it is so warm out you hardly need a coat on. Next pay I have to get the kiddies thin underwear & summer clothes, their other clothes are so heavy now. Well Earl I guess this will be all for now I have to go down town now and mail this letter today.

"Margaret."

Another letter to the applicant from his wife is produced under date 28th November 1940. The following is an extract from it:

"Well Earl in reply to your last letter in which you ask me to lay all my cards on the table, I will try to do so. The name of the person I'm interested in is Mr. R. Adams, his full name and address is—

Pte. Adams, R.

K-53800

'C' Company

Seaforth Highlanders of Canada,

Curry Barracks,

Calgary, Alta.

He is Scotch born in Glasgow, Scotland, age 32, Landscape Gardener by trade and single. I first became acquainted with

him a little over a year ago. We find that we have much in common. He sees no barrier in the children, the children are quite fond of him and he is fond of them. He has always respected your name and has never at any time been but a gentleman to me. As regards divorce, I think you should get in touch with him & try and arrange something to your mutual advantage. As regards the children, I think that is your obligation to them until they are of legal age—I would of course keep the children. It would be your right to see the children have a good home and the money you give would be for their benefit only and education etc. Please Earl if you aim to do anything, please hurry as we wish to get married before Robert goes overseas as he is in the 1st. Division Reinforcement Troops Seaforths and expects to go over the first sign of Spring. As to what grounds we could get a divorce on, I am leaving everything to you and would be willing to abide by anything you say as I know you would even now look after my welfare. I have taken Dr. Green in my confidence and asked for advice. He states that in the interests of my health re. worry, etc. we should come to an understanding as to our plans to the future as this is no way for anyone to live. Hoping you understand and find the answer to your questions you asked me. I hope you are well and happy and have a nice Xmas Earl. Guess I had better close now.

“Margaret.”

The applicant's affidavit further states that in or about the month of September 1943 he visited his wife and family in Chilliwack, British Columbia, where she had moved from Cranbrook at her request and at his expense; that at this time he offered to forget the past and asked her to accompany him to Ontario, where they would live together, with their children; that his wife said she would not accompany him, and that she would never leave British Columbia; that from 1934 until 1946 he had provided for his wife and children by sending amounts that would average \$125 a month; that he made these payments until he consulted his solicitors in 1946 with a view to obtaining a divorce, at which time his solicitors advised him to discontinue payments to her; that since 1946 he has not corresponded with his wife; that on the 5th January 1950 Mr. Burbridge, the judge of the Family Court at Hamilton, stated that

although formerly he was of the opinion that the appellant should be permitted to present his defence, he was now of the opinion that he could not go behind the order made against the applicant for maintenance in British Columbia, and the applicant was, therefore, not given an opportunity to present his defence; that since November 1934 he has resided in the Province of Ontario, where he is steadily employed; that he has been so employed since 1934 by the Department of Highways, and since 1934 has intended to settle in Ontario.

No affidavit was filed on behalf of the wife, Margaret Estella Kenny, on the motion, and the applicant's affidavit stands uncontradicted. In so far as it is relevant to any question properly before us in this proceeding, it may be considered.

I do not think that, in this present proceeding, there can be a trial of the merits of the wife's complaint laid before the stipendiary magistrate. If, however, it is made to appear that the magistrate was without jurisdiction to receive and try the complaint, then his decision as to the rights of the complainant has no validity, and his order is a nullity. Any exercise of unauthorized jurisdiction is an usurpation of the royal prerogative and unwarranted by law, and may be restrained by prohibition: *London Corporation v. Cox et al.* (1867), L.R. 2 H.L. 239, per Willes J. at p. 254. The statute of Ontario, s. 2 of which I have already quoted, and under which proceedings are being taken to enforce the order of the British Columbia magistrate, has no application to that order if there was no jurisdiction in the British Columbia magistrate to make the order.

It is clearly established by the applicant's affidavit that he came from British Columbia to Ontario in the year 1934 for the purpose of establishing a home in the latter Province for himself, his wife and children. He has ever since resided in the Province of Ontario, and the only reason that he has not established a home in the latter Province for his wife and children is that his wife has refused to join him there, and has preferred a divorce to enable her to marry another man, to whom she has become attached.

Subject to exceptions made by statute, the judgment of the Court of another Province of the Dominion is to be regarded in Ontario as the judgment of a foreign country: *Vézina v.*

Will H. Newsome Co. (1907), 14 O.L.R. 658; *Lung v. Lee*, 63 O.L.R. 194, [1929] 1 D.L.R. 130.

In all personal actions the Courts of the country in which the defendant resides, and not the Courts of the country where the cause of action arose, should be resorted to: *Sirdar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A.C. 670; Dicey's *Conflict of Laws*, 6th ed. 1949, c. 12 at p. 351; *Burn v. Bletcher* (1863), 23 U.C.Q.B. 28 at 36, where Draper C.J. says:

"As we understand the law, every foreign judgment may be impeached on the ground that the proceedings were contrary to natural justice, or, if the action be *in personam*, (as this action is averred to have been and appears plainly to be,) that the foreign court had no jurisdiction over the person of the defendant."

The magistrate holding office for a district within the territorial limits of British Columbia has no extraterritorial jurisdiction, and the Legislature had no power to give him any, that extended beyond the Province. "The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom": *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455 at 458, per Lord Halsbury, quoting from Baron Parke in *Jefferys v. Boosey* (1854), 4 H.L. Cas. 815 at 926, 10 E.R. 681. He had no jurisdiction conferred upon him that warranted the issue of a summons directed to the appellant at Hamilton, in the Province of Ontario, and the service of that summons upon the appellant there. He had no jurisdiction vested in him to proceed to inquire into the matter of the wife's complaint, upon the return of the summons, the appellant not appearing or in any way submitting to his jurisdiction. The order he assumed to make against the appellant was likewise wholly beyond the magistrate's jurisdiction. Neither his summons nor his order had any validity as against the resident of another Province.

Reference was made in the proceedings before the judge of the Family Court in Hamilton, and before Mr. Justice Smily, to the case of *Gagen v. Gagen*, 48 B.C.R. 481, [1934] 3 W.W.R. 84, [1934] 4 D.L.R. 409, 62 C.C.C. 286. In that case the husband was resident in New Zealand when proceedings were taken against him in British Columbia for desertion; ". . . the

defendant deserted his wife in British Columbia, and then left here and has continued his desertion for the last six years in New Zealand" is the description given of the circumstances by Macdonald C.J.B.C. The appellant was not charged with desertion beginning in 1934, at the time when he left British Columbia for Ontario, and the order of the magistrate in British Columbia is not in relation to any such desertion. The evidence here is clear and specific that the appellant came to Ontario for the purpose of making a home there for himself and for his wife and children, and that he continued to support them until 1946, when, acting on his solicitor's advice, he ceased to make remittances to his wife, after she had told him she would not leave British Columbia, and admitted her attachment to another man.

It is not necessary, for the purposes of this appeal, that we should agree with what was done by the British Columbia Court of Appeal in *Gagen v. Gagen*, *supra*, as the ground upon which the jurisdiction of the British Columbia Court was upheld in that case is not present in this case.

There are in force in both the Provinces of British Columbia and Ontario statutes to facilitate the enforcement of maintenance orders, in very similar terms. Sections 3 and 4 of the Ontario statute and ss. 4 and 5 of the British Columbia statute, in similar terms, establish procedure where an application is made to a Court in Ontario or British Columbia, as the case may be, for a maintenance order, and it is proved that the person against whom the order is sought is resident in England or Northern Ireland or any reciprocating State, as defined in the statute. The Court may, in the absence of that person and without service of notice on him, make a provisional order, which is to have no effect unless and until confirmed by a competent Court in England or in Northern Ireland or in such reciprocating State, as the case may require. It is a fair conclusion that these provisions were intended to establish a procedure that would avoid difficulties arising from the limited territorial jurisdiction of the Provincial Legislature, and to avoid difficulties that do not arise under Imperial legislation. The absence of any authority to a magistrate to issue and serve an ordinary summons outside the limits of his Province would seem to exclude any intention on the part

of the Legislature that a magistrate should proceed as was done in the present case.

There being no jurisdiction in the magistrate, a certified copy of whose order was filed in the Family Court at Hamilton, the judge of that Court had nothing upon which he could proceed. There was no order for him to enforce, and his own order was, therefore, also a nullity.

The judge of the Family Court at Hamilton was of the opinion that he could not inquire into the question of the jurisdiction of the British Columbia magistrate, when that question was raised by counsel for the appellant, and Smily J. entertained the same opinion.

With respect, I am of the opinion that not only was the question of the jurisdiction of the British Columbia magistrate open to investigation, but when the question was raised there was no option but to determine it, before proceeding to enforce the order as a valid order. The liberty of the subject was in issue, and the appellant was before the magistrate on a summons to show cause, and had a right to be heard. It was surely good cause if it was made to appear that there was no valid order before the Court. The Court of Appeal in British Columbia was not the only tribunal able to determine that matter, as the magistrate seems to have thought. The order was not one that would remain a valid order until it was declared otherwise. It never had any legal validity and was never capable of legal enforcement. " . . . a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary": *Bonaker v. Evans* (1850), 16 Q.B. 162, 117 E.R. 840.

The appeal should be allowed. The registration of the British Columbia order should be set aside, and an order should go prohibiting the taking of any action in the Family Court at Hamilton to enforce the order of the British Columbia magistrate.

Appeal allowed.

Solicitors for the applicant, appellant: Bogart & MacMaster, Toronto.

Solicitor for Margaret Estella Kenny, respondent: Timothy J. McKenna, Hamilton.

[COURT OF APPEAL.]

Smith et al. v. MacDonald.

Combines—Powers and Duties of Commissioner—Resignation of Commissioner after Making of Investigation—Whether New Commissioner Entitled, after Review of Evidence and other Steps, to Report to Minister—The Combines Investigation Act, R.S.C. 1927, c. 26, ss. 2(2), 3, 5(1), 6, as amended—The Interpretation Act, R.S.C. 1927, c. 1, s. 31(1) (m).

Section 27(1) of The Combines Investigation Act, as amended, does not limit the making of a report by the Commissioner to a case where the Commissioner reporting has himself conducted the preliminary investigation. Where a Commissioner, having instituted an investigation, resigned his office before making a report, and the deputy commissioner, who had actually made the investigation, also resigned, *held*, the newly-appointed Commissioner, after reviewing the evidence taken and affording an opportunity to the persons affected to make representations, had power to make a report to the Minister on the basis of the investigation.

Judgment of SPENCE J., [1950] O.R. 880, affirmed.

AN APPEAL by the plaintiffs from the judgment of Spence J., [1950] O.R. 880, 10 C.R. 374, [1951] 1 D.L.R. 617.

25th January 1951. The appeal was heard by ROBERTSON C.J.O. and HOPE and AYLESWORTH JJ.A.

Joseph Sedgwick, K.C., for the plaintiffs, appellants: The defendant is not the Commissioner who authorized the inquiry or under whose jurisdiction the witnesses were heard and the documents were examined. The inquiry was commenced by the former Commissioner, apparently because he believed that a combine existed or was being formed (s. 12 of The Combines Investigation Act, R.S.C. 1927, c. 26, as re-enacted by 1946, c. 44, s. 5). Sections 27 and 28 deal with the procedure to be followed at the conclusion of an inquiry. Section 27(1), as re-enacted by 1935, c. 54, s. 20, and amended by 1937, c. 23, s. 4, provides that: "*The Commissioner at the conclusion of every investigation which he conducts shall make a report in writing*". The pronoun "he" is personal to the Commissioner, and refers back to s. 12, meaning the person who instituted the inquiry for one of the reasons there set out; it must be the same person and not merely the holder of the same office. Since the person who caused the inquiry to be made, under s. 12, was the former Commissioner, he is the only person who can make a report under s. 27(1), and if he does not do so no person subsequently appointed has power to make a report. [HOPE J.A.: The form of the investigation is in the discretion of the Commissioner,

is it not?]) Within limits, yes, but of course it is subject to the statute, and to The Inquiries Act, R.S.C. 1927, c. 99. [HOPE J.A.: That being so, what about the investigation made by the present Commissioner, the defendant? You are referring to the investigation made by his predecessor.] Reading documents and a transcript of evidence is not making an inquiry, and in any event, the defendant did not initiate the inquiry.

Under s. 27, once the Commissioner has made a report, the Minister must publish it, no matter how unfair it may be. We have launched these proceedings to prevent the publication of the report that we apprehend may be made. [HOPE J.A.: If the defendant had made a five-minute inquiry, would he not be justified in taking the action he did in issuing the notice, in October, in which he asserted his right to make a report notwithstanding the objections of the plaintiffs?] That could hardly be called an investigation. [HOPE J.A.: To investigate is merely to make a careful inquiry.] A true inquiry is a probing into the facts, by the examination of witnesses, documents, etc. Some weight must be given to s. 18, which says that all provisions of The Inquiries Act are to be applicable unless they are inconsistent with the provisions of The Combines Investigation Act. No commissioner appointed under The Inquiries Act could proceed in the perfunctory manner suggested.

Special commissioners have the same power to make an inquiry as the permanent Commissioner, but it is clear under s. 27(3) as enacted by 1937, c. 23, s. 10, that a special commissioner, if he has made the inquiry, must sign the report.

I have no quarrel with the trial judge's statement that the Commissioner under this Act is an administrative tribunal, but that is not important. I agree with and adopt the trial judge's statement that none of the cases cited to him goes so far, or could go so far, as to hold that if an administrative tribunal acts altogether outside its jurisdiction it is not subject to restraint by order of the Court, and I also adopt his interpretation of s. 3 of the statute.

The defendant did not cause an inquiry to be made. He merely took over the results of an inquiry instituted by another Commissioner. He must first have reason to believe that a combine exists or is being formed, after which he initiates an

inquiry; at the conclusion of the inquiry, and only then, is he entitled to make a report.

It is not open to the Court to say that because the course prescribed by a statute is difficult, inconvenient and expensive, some other course may be followed. In default of special legislation authorizing it, the defendant cannot report on an inquiry conducted by his predecessor: *The Judicature Act, R.S.O. 1937, c. 100, s. 9(1)*; *Clarke et al v. Trask et al.* (1901), 1 O.L.R. 207.

Section 15 of *The Interpretation Act, R.S.C. 1927, c. 1*, does not apply to penal statutes. *The Combines Investigation Act* has been held to be a penal statute, and it should therefore be construed strictly, and not given a wide and liberal construction as provided for in the case of other statutes by s. 15.

J. J. Robinette, K.C., for the plaintiffs, appellants: I adopt Mr. Sedgwick's argument, and shall only emphasize some aspects of the situation. The making of a report may entail serious consequences because under s. 27(5) as enacted by 1937, c. 23, s. 10, the Minister has no discretionary power to withhold publication unless the Commissioner recommends it.

The defendant purported to continue an existing inquiry. He did not purport to institute a new inquiry. Under s. 27(1), only the Commissioner who personally conducts the inquiry has legal authority to make a report. The word "Commissioner" is defined in s. 2(2) as re-enacted by 1937, c. 23, s. 2(1), and under para. 2 of the Regulations made in 1947 (P.C. 1291) it is provided that a deputy commissioner has all the powers and duties of a Commissioner under ss. 14 to 24; he is not given the Commissioner's power to make a report under s. 27. [ROBERTSON C.J.O.: If we give to s. 27 the meaning you attach to it, is it not true that if an inquiry is made even in part by the deputy there can be no report?] To "conduct" an inquiry means to supervise, lead, or give direction to the inquiry. The person who conducts in that sense is the only person who can make the report. He can delegate some functions, such as the taking of evidence, but he alone can make the report. That is emphasized again in s. 27(3), dealing with special commissioners. Exactly the same language is used in *The Inquiries Act*. It was never intended under that Act that if one commissioner resigned a new commissioner could look at evidence taken by the former commissioner and make a report: ss. 3 and 13. [ROBERTSON C.J.O.: Would you say that if

the Commissioner under The Combines Investigation Act died after instituting an inquiry there could be no report?]. There would have to be a new inquiry. If the persons examined consented to the use of the old evidence, to avoid being examined again, I suppose the new Commissioner would have jurisdiction. [ROBERTSON C.J.O.: You are trying to read into s. 27 a prohibition that is not there. There seems to be no foundation for saying that the Minister cannot have the present Commissioner prepare a report.] [HOPE J.A.: If the defendant had said that he proposed to make a report based upon the investigation conducted by his predecessor, I would appreciate your argument, but he said he was going to continue the investigation. Is it not then an investigation conducted by him?] The examination of witnesses and documents was all done by the former deputy, and the defendant was relying on those examinations, which I submit he had no right to do.

Section 31(1) (*m*) of The Interpretation Act applies only if no contrary intention appears in the particular statute. It is inapplicable to s. 27(1) of The Combines Investigation Act because it is clear that the word "Commissioner" in that Act does not include a deputy commissioner. [AYLESWORTH J.A.: And you argue, on that premise, that it is not applicable to the successor of the Commissioner?] I realize that the argument does not carry me completely to my point, but it is indicative. Even if s. 31(1) (*m*) is applicable, it still follows that the only Commissioner who can make a report is the one who conducted the investigation. [AYLESWORTH J.A.: Is it not a straining of the meaning of s. 27(1) to say that, where his successor does some administrative acts in respect of the investigation? There is no peremptory direction that the Commissioner shall take evidence in every case.] Merely reading documents or evidence obtained by someone else is not making an investigation. [HOPE J.A.: The defendant did not adopt his predecessor's investigation, but expressly said that he was continuing it.] He was continuing it only in the sense of making a report.

Our whole submission is that the defendant is proposing to report upon an investigation conducted by his predecessor, and that he has no right to do that.

T. N. Phelan, K.C., for the defendant, respondent: If the appellants are correct in their contention all the work done

under the former Commissioner would have to be done again, and this could not benefit them. If it must be done it will be done, but all that the appellants will gain is delay.

I adopt the reasons and conclusions of the trial judge.

Section 27(1) must be read with s. 31(1) (m) of The Interpretation Act.

Jurisdiction in respect of an investigation is vested in a tribunal, not in a person: s. 5. It is not a particular officer who acts, it is the office or the tribunal. The appellants' argument is based upon the word "he" in s. 27(1), but that word should not and does not control the whole Act.

The real problem is in the construction of the statute, and the leading case on construction is *Heydon's Case* (1584), 3 Co. Rep. 7a, 7b, 76 E.R. 637. I refer also to 31 Halsbury, 2nd ed. 1938, p. 478. We must see whether Parliament ever contemplated the appellants' interpretation of the word "he" in s. 27. What useful result would be achieved by starting everything *de novo*?

I refer to and rely on ss. 15 and 31(1) (e), (f), (l) and (m) of The Interpretation Act.

There is no doubt that this is an administrative tribunal: *O'Connor v. Waldron*, [1935] A.C. 76 at 83, 63 C.C.C. 1, [1935] 1 D.L.R. 260, [1935] 1 W.W.R. 1; *Re The Imperial Tobacco Co. Ltd. et al. and McGregor*, [1939] O.R. 213, [1939] 3 D.L.R. 750 (sub nom. *Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.*), affirmed [1939] O.R. 627, 72 C.C.C. 321, [1939] 4 D.L.R. 99. The Courts are loath to interfere with an administrative tribunal unless the lack of jurisdiction is clear. The defendant was simply carrying on the investigation begun by his predecessor.

Section 9 of The Judicature Act refers to judges, and has no application to an administrative tribunal. As to the powers of an administrative tribunal, I refer to *Local Government Board v. Arlidge*, [1915] A.C. 120 at 133.

The defendant has discharged his duty. Having the materials properly before him, and having reviewed them, he has conducted the investigation.

Joseph Sedgwick, K.C., did not reply.

Cur. adv. vult.

20th February 1951. The judgment of the Court was delivered by

ROBERTSON C.J.O.: This is an appeal by the plaintiffs from the judgment of Spence J., dated 27th November 1950, dismissing the action with costs. The plaintiff Smith is the secretary of the Rubber Association of Canada. The plaintiff Oakie is the assistant-secretary of that Association, which is also a plaintiff, and is said to be a non-profit organization, incorporated under the Dominion Companies Act. The other plaintiffs are firms engaged in the manufacture or sale of rubber goods. The defendant is the Commissioner appointed under The Combines Investigation Act, R.S.C. 1927, c. 26.

The plaintiffs had brought an action for a declaration that the defendant, in so far as a certain investigation under The Combines Investigation Act into the rubber industry is concerned, is not the Commissioner named in s. 27 of that Act, and that he has no power thereunder to make a report in writing to the Minister on the said investigation. The plaintiffs also claimed an injunction restraining the defendant from presenting a report on the said investigation pursuant to the provisions of the said Act.

The defendant, by his statement of defence, admitted all the material allegations of fact contained in the statement of claim, and submitted that the plaintiffs had established no right in law to the relief claimed.

The plaintiffs, after the delivery of pleadings, moved the Court for an injunction until the trial of the action, restraining the defendant, in his capacity as Commissioner under The Combines Investigation Act, from making a report to the Minister pursuant to s. 27 of the said Act, on the conduct of the plaintiffs as disclosed in the course of the investigation referred to.

The defendant thereupon gave notice that on the return of the plaintiffs' motion for an injunction, the Court would be moved on behalf of the defendant for a judgment dismissing the action upon admissions of fact in the pleadings set forth. Both motions came on for hearing and were argued together before Spence J., who reserved judgment and later dismissed the plaintiffs' motion for an injunction, and awarded the defendant judgment on his motion dismissing the plaintiffs' action with costs. The plaintiffs now appeal, asking that both orders be reversed.

Some further statement of facts, as admitted in the pleadings, is necessary to state the case fully.

The defendant was appointed Commissioner under The Combines Investigation Act on 23rd February 1950. In September 1947 F. A. McGregor, being then the Commissioner under the said Act, caused an inquiry to be commenced under the said Act to determine whether a combine existed in Canada in connection with the manufacture, distribution and sale of rubber goods and related products. In or about the month of September 1948 F. A. McGregor, being still the Commissioner, authorized one Ian M. MacKeigan, then a deputy commissioner under the said Act, to carry on the said investigation.

The said Ian M. MacKeigan examined documents, books and memoranda in the possession of the plaintiffs and others, and conducted an oral examination of individual plaintiffs and of officers, servants and agents of the corporate plaintiffs and of many other persons. The examination of documents and of witnesses continued under the direction of the said Ian M. MacKeigan at various times and places up to about the 1st September 1949.

At some time prior to 31st December 1949 F. A. McGregor tendered his resignation as Commissioner, and Ian M. MacKeigan tendered his resignation as deputy commissioner. The resignation of F. A. McGregor was accepted and became effective as of 1st January 1950, and the resignation of Ian M. MacKeigan was accepted and became effective as of 10th December 1949, and on these respective dates the said McGregor and the said MacKeigan ceased to have any official or other status or authority under The Combines Investigation Act.

The defendant, shortly after his appointment as Commissioner on 23rd February 1950, undertook to review the evidence that had been taken in the investigation conducted by Ian M. MacKeigan, as hereinbefore stated. Under date of 1st September 1950 the defendant, as Commissioner under The Combines Investigation Act, wrote to each of the plaintiffs enclosing a report that had been made to him by T. N. Phelan, K.C. (who had been acting as counsel to the Commissioner in the aforesaid investigation), and inviting the plaintiffs to make written representations in answer thereto, or, alternatively, to appear before the defendant in Ottawa on 2nd October 1950, to make oral representations.

The plaintiffs, represented by their respective counsel and reserving all rights, appeared before the defendant in Ottawa on Monday, 2nd October 1950, and objected to the jurisdiction of the defendant and to any right or authority in him to make any report to the Minister pursuant to s. 27 of The Combines Investigation Act, on the ground that the defendant, not being the Commissioner named in the section, had no right or authority to make any such report.

The defendant, by written notice dated 11th October 1950, and sent to all the plaintiffs or to their counsel, has asserted his right to present a report to the Minister, notwithstanding the objections of the plaintiffs, and has indicated his intention so to do.

The foregoing are the material facts set out in the statement of claim and admitted by the statement of defence.

In his judgment disposing of the two motions before him Mr. Justice Spence, in my opinion, dealt in a clear and convincing manner with the several points of the respective arguments, and I should not think it necessary to add anything to what he has said but for the emphasis laid by counsel for the appellants upon what, in their submission, is the plain meaning of s. 27(1). The subsection, as re-enacted by 1935, c. 54, s. 20, and amended by 1937, c. 23, s. 4, reads as follows:

"The Commissioner at the conclusion of every investigation which he conducts shall make a report in writing and without delay transmit it to the Minister. Such report shall set out fully the conclusions reached, the action, if any, taken, and any other material which may be required by regulation under this Act."

Appellants' counsel present this subsection as constituting the only authority of the Commissioner to make a report, and as limiting the power to make such a report to the individual who, as Commissioner, conducted the investigation. I venture to think that that was not the purpose of the subsection. Rather, its purposes are to require that there shall be no delay in transmitting the report to the Minister, and to provide what it shall contain.

There are no words in the subsection, or anywhere else that I am aware of, that prohibit the making of a report by the Commissioner upon an investigation that he has not himself conducted, such report containing all that the subsection requires

and being forwarded to the Minister. The Commissioner who conducted an investigation having died or become incapacitated, or having vacated office before his report had been made, there is nothing in the subsection that places a ban upon the making of a report upon the investigation by his successor in office. It may in fact be a matter of great consequence that the Minister should have such a report. It was argued that a report so made would not be a report made under this subsection. That, however, overlooks the provisions of The Interpretation Act, R.S.C. 1927, c. 1, s. 31(1) (*m*), which provides:

“Words directing or empowering any other public officer or functionary to do any act or thing, or otherwise applying to him by his name or office, include his successors in such office, and his or their lawful deputy.”

The word “other” in the first line refers to the immediately preceding clause (*l*), which provides for the case of a “Minister”.

As is pointed out by Mr. Justice Spence, the duties imposed upon a Commissioner under The Combines Investigation Act are of an administrative and not of a judicial nature. It does not appear to be the intention of the statute that the Commissioner who “conducts” an investigation must himself hear all the witnesses, or any of them. His powers of delegation to a deputy are wide: s. 6, subss. 2 and 3, as re-enacted by 1946, c. 44, s. 2. There does not seem, however, to be any requirement of a report by the deputy commissioner, except perhaps when authorized by the Governor in Council under s. 6(2). On the other hand, it is obvious that much time and money may be wasted, and the purpose of the Act may be defeated, by a too narrow interpretation of the requirements of s. 27(1).

It is of some interest to observe an earlier form of this subsection.

Some extensive changes were made in the statute by 1935, c. 54. By the amending Act “Commission” was defined as the Dominion Trade and Industry Commission established under The Dominion Trade and Industry Commission Act, 1935. This was a commission consisting of three commissioners, and the members for the time being of the Tariff Board were, by virtue of holding office as members of that Board, to be the commissioners. Subsection 1 of s. 27, as re-enacted by the amending Act of 1935, was as follows:

"The Commission at the conclusion of every investigation which they conduct shall make a report in writing and without delay transmit it to the Minister. Such report shall set out fully the conclusions reached, the action, if any, taken, and any other material which may be required by regulation under this Act."

Under that provision the duty to make a report was imposed upon "the Commission" in respect of every investigation which they conducted. It would seem to be an unreasonable construction of that provision to read it as providing that the Commission should, at all times, in conducting an investigation and in reporting upon it, be composed of the same three individuals, and that the death of or vacating of office by any one of them should make a report impossible. A reasonable interpretation of the subsection would be to substitute for the word "they" in the second line, the words "the Commission". It would seem inconceivable that such an argument as is now advanced in regard to the present subs. 1 of s. 27 would have received serious consideration if applied to the subsection as enacted in 1935.

In 1937 the statute was again amended by c. 23 of the statutes of that year. It provided for the appointment of a Commissioner in place of the Commission appointed under the statute of 1935, and also for the appointment of special commissioners by the Governor in Council. The substitution of a Commissioner for the Commission necessitated throughout the statute numerous small changes in verbiage, and this was largely accomplished by s. 4 of the amending Act of 1937, which is as follows:

"Wherever in sections ten, eleven, thirteen, fourteen, sixteen, seventeen, eighteen, twenty, twenty-two, twenty-three, twenty-four, twenty-six, twenty-seven, thirty-one, thirty-three, to thirty-six, both inclusive, and forty-one of the said Act, as enacted by chapter fifty-four of the statutes of 1935, the words 'Commission' or 'Commission or any Commissioner', appear there shall be substituted therefor the word 'Commissioner', and whenever in the said sections the words 'they', 'it' or 'its', referring to the Commission, appear, the word 'he' shall be substituted for the words 'they' and 'it', and the word 'his' shall be substituted for the word 'its'."

No doubt this was an effective way of amending the statute, but it does not, upon a mere reading of the section, give one a clear comprehension of the result. It will be found that in one

case where the word "he" is substituted for the word "it", to be grammatical it should be "him" and not "he". In s. 27(1) it escaped the eye of the draftsman that the word "conduct" required to be changed to "conducts". The effect of substituting an individual for a commission of three then already forming a board, is not at once apparent in an amending statute of this character. As was said in *Salmon v. Duncombe et al.* (1886), 11 App. Cas. 627 at 634: "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law."

These are matters in themselves of trifling importance, but they would seem to indicate that there was no intention, in substituting a Commissioner for the Commission, that any such substantive change should be made as would bring about the inconvenient result contended for by the appellants. The change is one of such consequence, if appellants' contention is to be given effect, as to justify the conclusion that Parliament did not intend so to alter the statute, and that this should be treated as one of the cases where, as a matter of construction, the statute should be read to accord with the plain intention of Parliament, rather than literally: see *McLeod v. Attorney-General for New South Wales*, [1891] A.C. 455.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Smith, Rae, Greer, Sedgwick, Watson & Thom, Toronto.

Solicitors for the defendant, respondent: Phelan, O'Brien & Phelan, Toronto.

[BARLOW J.]

**Canadian Seamen's Union v. Canada Labour Relations Board
and Branch Lines Limited.**

Labour Law—Legal Position of Unincorporated Trade Union—Absence of Right to Sue—The Industrial Relations and Disputes Investigation Act, 1948 (Can.), c. 54, ss. 45, 47, 52, 61—Originating Notice of Motion—Rule 10.

An unincorporated trade union, not registered under any statute, is not a legal entity and has no right to launch in its own name an application in the Supreme Court by way of originating notice of motion. It is clear that apart from statute such a body has no such capacity. *Amalgamated Builders Council v. Herman* (1930), 65 O.L.R. 296 at 297; *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America et al.*, [1931] S.C.R. 321 at 327, applied. While The Industrial Relations and Disputes Investigation Act recognizes trade unions for some specific purposes, such as the enforcement of collective bargaining agreements and the collection of money, it does not confer upon them a legal existence generally. *In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1*, [1947] 2 W.W.R. 510; *Vancouver Machinery Depot Limited et al. v. United Steelworkers of America et al.*, [1948] 2 W.W.R. 325, distinguished.

Labour Law—Powers of Canada Labour Relations Board—Review and Revocation of Previous Order—Decertification—Discretion as to Evidence to be Admitted—Review on Certiorari—The Industrial Relations and Disputes Investigation Act, 1948 (Can.), c. 54, ss. 2(1)(r), 11, 58(5), (6), 61(1), (2).

The Canada Labour Relations Board, constituted under The Industrial Relations and Disputes Investigation Act, has clear authority, under s. 61(2) of the Act, to review and, if it considers it advisable, revoke, an order previously made by it certifying a trade union as bargaining agent for a group of employees. If, *e.g.*, it appears that the union is no longer an organization of employees formed for the purpose of regulating relations between employers and employees, and hence not within the definition of "trade union" in s. 2(1)(r), the Board may revoke the certification, and is not limited to the case contemplated by s. 11, where a union no longer represents the majority of the employees in the bargaining unit. Under s. 58(6) the Board is given the widest possible latitude as to the evidence and information it may receive and accept, and if there was some evidence before the Board justifying its decision the Court will not, on a motion in the nature of *certiorari*, review the weight of that evidence. *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128 at 153; *Re Rex v. Edwards*, [1938] O.R. 12; *Rex v. Irwin*, [1943] O.W.N. 668; *Re Robinson*, [1948] O.R. 487, applied. The Board must of course proceed within the four corners of the Act, fairly and in good faith, and it must give the parties a full opportunity of being heard. If it has done this, and if there was some evidence before it on which it could reach its decision, that decision will not be reviewed by the Court. *St. John et al. v. Fraser*, [1935] S.C.R. 441 at 454; *Local Government Board v. Arlidge*, [1915] A.C. 120 at 137, 141, 142; *Board of Education v. Rice et al.*, [1911] A.C. 179 at 182, applied.

AN APPLICATION to quash an order of the Canada Labour Relations Board.

7th February 1951. The application was heard by BARLOW J. in chambers at Toronto.

Joseph Sedgwick, K.C., for the applicant.

J. J. Robinette, K.C., and *J. W. Brooke*, for the Canada Labour Relations Board, *contra*.

J. D. Arnup, K.C., and *J. T. Weir*, for Branch Lines Limited, *contra*.

23rd February 1951. BARLOW J.:—An application by the Canadian Seamen's Union by way of originating notice of motion for an order by way of *certiorari*, staying all proceedings and quashing an order of the Canada Labour Relations Board dated the 7th December 1950, which order revoked an order of the 20th November 1947, certifying the applicant as the bargaining agent of a unit of employees of the respondent Branch Lines Limited. The motion is made on the following grounds:

"(a) That the said Board had no right or jurisdiction under The Industrial Relations and Disputes Investigation Act or otherwise to make the said order of December 7th, 1950.

"(b) That the said Board had no power under the said Act or otherwise to order the decertification of the applicant Union for the reasons given in the said order.

"(c) That there was no evidence before the said Board on which it could make the said Order.

"(d) That the said Order is contrary to and constitutes a denial or violation of natural justice."

On the 20th November 1947 the applicant, by an order made by the Wartime Labour Relations Board, was certified as the bargaining agent of a unit of employees of the respondent Branch Lines Limited. This order continued in effect by virtue of the provisions of The Industrial Relations and Disputes Investigation Act, 1948 (Can.), c. 54.

The last collective bargaining agreement entered into between the applicant and Branch Lines Limited expired on the 1st June 1950.

On the 6th July 1950, Branch Lines Limited made a formal application to Canada Labour Relations Board for an order revoking the certification of the applicant as the bargaining agent of a unit of employees of the respondent Branch Lines Limited. This application came on for hearing before the Board on the 9th August 1950, in the presence of counsel for both parties. After a most patient hearing, the Board reserved its decision.

On the 9th November 1950, by letter from Mr. M. M. Maclean, the chief executive officer of the Board, to Mr. Marcus, solicitor for the applicant herein, the latter was advised that the Board had decided to accept as evidence a certain white paper of the British Government and certain reports and resolutions set out in the letter, which further stated that "the Board is prepared to receive any written representation with respect to the items mentioned which the respondent desires to submit for the Board's consideration". Mr. Marcus acknowledged the letter, but made no representations. Mr. Davis, president of the applicant, wrote a letter in reply but made no representations.

On the 7th December 1950 the Board issued a unanimous judgment with reasons, revoking the certification of the applicant. The applicant now moves by way of *certiorari*, for an order as above set out.

The respondent Canada Labour Relations Board was set up under The Industrial Relations and Disputes Investigation Act, s. 58, and its powers must be found within the four corners of this Act. It is given very wide powers under s. 58, as follows:

"(5) The Board shall have the powers of commissioners under Part I of the *Inquiries Act*.

"(6) The Board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.'

It is to be noted that the latter subsection gives the Board the widest possible latitude as to the evidence and information which it may receive and accept. It is not limited to such evidence as may be admissible in a court of law.

Counsel for the applicant contends that the Board had no right or jurisdiction under the said Act to make the order of the 7th December 1950. He contends that unless the order can be made under s. 11 of the Act, it cannot be made. Section 11 is as follows:

"Where in the opinion of the Board a bargaining agent no longer represents a majority of employees in the unit for which it was certified, the Board may revoke such certification and thereupon, notwithstanding sections fourteen and fifteen of this Act, the employer shall not be required to bargain collectively with the bargaining agent, but nothing in this section shall pre-

vent the bargaining agent from making an application under section seven of this Act."

The Board found that the material before it did not show that the applicant no longer represented the majority of the employees in the bargaining unit, and the Board did not purport to base its order on s. 11. Clearly s. 11 provides for revocation of certification in the specific instance where "a bargaining agent no longer represents a majority of employees".

When making an order for certification, the Board must decide:

1. that the organization applying is a union within s. 2(1)(r) of the Act, which is as follows: " 'trade union' or 'union' means any organization of employees formed for the purpose of regulating relations between employers and employees but shall not include an employer-dominated organization", and
2. that it represents a majority of the employees.

The Board now has revoked the certification on the ground that the applicant is not an organization of employees formed for the purpose of regulating relations between employers and employees. It is on this ground that the certification of the applicant has been revoked. This order is made by the Board under the powers given to it by s. 61 of the Act. The pertinent parts of this section read as follows:

"(1) If in any proceeding before the Board a question arises under this Act as to whether . . .

"(b) an organization or association is an employers' organization or a trade union, . . .

the Board shall decide the question and its decision shall be final and conclusive for all the purposes of this Act.

"(2) A decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act."

It should be noted that under subs. 2 quoted above, the Board, if it considers it advisable so to do, may reconsider any decision or order made by it under the Act and may vary or revoke any decision or order made by it under the Act. It is clear to me

that the Board had ample power under the Act to make the order in question in these proceedings.

Counsel for the applicant further contends that there was no evidence before the Board on which it could make the order in question. Counsel, however, admits that if there is any evidence it is not for this Court to consider its weight. The weight of the evidence is for the Board.

Under s. 58(6) quoted above, the Board was entitled to receive and act upon the documentary evidence of which notice was given to the applicant herein.

In my opinion it is unnecessary for me to discuss the evidence in detail, because I am satisfied that there was some evidence before the Board upon which it could make the order: see *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128 at 153, 37 C.C.C. 129, 65 D.L.R. 1, [1922] 2 W.W.R. 30; *Re Rex v. Edwards*, [1938] O.R. 12, 69 C.C.C. 305, [1938] 1 D.L.R. 525; *Rex v. Irwin*, [1943] O.W.N. 668, 80 C.C.C. 314, [1944] 1 D.L.R. 618; and *Re Robinson*, [1948] O.R. 487, 92 C.C.C. 91.

Counsel for the applicant further contends that the Board did not proceed properly and that the applicant was not given an opportunity to be heard. The law is well settled that the Board must proceed within the four corners of the Act, and it must proceed fairly, in good faith, and give the parties an opportunity to be heard.

After a careful perusal of all the steps taken it appears to me that this was done. The Board, at the hearing on the 9th August 1950, gave full opportunity to the applicant herein to present its case. The letter to the applicant on the 9th November 1950, mentioned above, showed clearly what documentary information the Board intended to use, and gave the applicant full opportunity to make representations, but it did not choose to do so. It is clear from the replies to this letter by Mr. Marcus, the applicant's counsel, and Mr. Davis, president of the applicant Union, that they were fully aware of the information contained in the documents before the Board. The Board proceeded in accordance with the Act in good faith and in a fair manner: see *St. John et al. v. Fraser*, [1935] S.C.R. 441 at 454, 64 C.C.C. 90, [1935] 3 D.L.R. 465; *Local Government Board v. Arlidge*, [1915] A.C. 120 at 137, 141, 142; *Board of Education v. Rice et al.*, [1911] A.C. 179 at 182.

Counsel for the respondents contend that the applicant is not a juridical entity and has no existence and is not entitled to bring this application. A proceeding commenced by originating notice of motion, as this proceeding is commenced, is an "action" under Rule 10 of the Rules of Practice, and the rules as to actions apply. The applicant is a trade union. It is not incorporated or registered under any statute. At common law a trade union was illegal and enjoyed no existence. It is of interest to note that under The Trade Unions Act, R.S.C. 1927, c. 202, s. 18, provision was made for a trade union to register, and if registered it was given the right to sue by its trustees with respect to property. The applicant is not registered under this Act.

In *Amalgamated Builders Council v. Herman*, 65 O.L.R. 296 at 297, [1930] 2 D.L.R. 512, Middleton J.A. held that apart from registration under The Trade Unions Act cited above, the plaintiff could not sue in its name. In that case the plaintiff had been registered under this Act, but Middleton J.A. held that since this Act was a statute dealing solely with property and civil rights, it was *ultra vires* of the Dominion Parliament, and the plaintiff could not sue in its unincorporated name.

The position of trade unions before the Courts is well defined in *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America et al.*, [1931] S.C.R. 321, [1931] 3 D.L.R. 361, where Cannon J. says at p. 327: "We must accordingly reach the conclusion that, while, under the prevailing policy, our legislation gives to unincorporated labour organizations a large measure of protection, they have no legal existence; they are not endowed with any distinct personality; they have no corporate entity; they constitute merely collectivities of persons."

See also *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association et al.* (1905), 9 O.L.R. 171; *Local Union No. 1562, United Mine Workers of America et al. v. Williams and Rees*, 59 S.C.R. 240 at 257, 49 D.L.R. 578, [1919] 3 W.W.R. 828; *Robinson v. Adams*, 56 O.L.R. 217 at 222, [1925] 1 D.L.R. 359; *London Association for Protection of Trade et al. v. Greenlands, Limited*, [1916] 2 A.C. 15 at 30.

It must therefore be found that the applicant is not a legal entity and has no right to bring the present proceeding unless

it is given a status to bring the proceeding by reason of the terms of The Industrial Relations and Disputes Investigation Act.

Counsel for the applicant contends that with respect to any proceedings under the said Act, the applicant is given a status to sue and in respect thereof the following cases are cited: *In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1*, [1947] 2 W.W.R. 510, and *Vancouver Machinery Depot Limited et al. v. United Steelworkers of America et al.*, [1948] 2 W.W.R. 325, [1948] 4 D.L.R. 518. Both of these cases were decided under the British Columbia labour Act, namely, The Industrial Conciliation and Arbitration Act, 1947 (B.C.), c. 44, which Act is differently constituted from The Industrial Relations and Disputes Investigation Act cited above. The first action cited above was a prosecution of the Nanaimo Dry Cleaning and Laundry Workers Union, Local No. 1, a trade union within the meaning of the British Columbia statute cited above, charging that the Union did unlawfully authorize a strike of the employees. A rule nisi was obtained prohibiting the magistrate from hearing the charge. This rule nisi was subsequently discharged and an appeal was taken therefrom on submissions that the magistrate lacked jurisdiction to entertain the charge in that the trade union was not a legal entity, and that even if it was a legal entity it was neither a person nor a corporation. The Court held that for the purposes of the Act and proceedings thereunder the trade union had been endowed by the Legislature by the terms of the enactment with the status, attributes and responsibilities of a *persona juridica* for the purpose of a prosecution under the Act.

This situation could not arise under The Industrial Relations and Disputes Investigation Act by reason of the fact that under s. 45 of the said Act it is provided that a union shall be a person for the specific purpose of a prosecution for an offence. The pertinent parts of s. 45(1) read as follows: "A prosecution for an offence under this Act may be brought against an employers' organization or a trade union and in the name of the organization or union and for the purpose of such a prosecution a trade union or an employers' organization shall be deemed to be a person. . . ."

Vancouver Machinery Depot Limited et al. v. United Steelworkers of America et al., *supra*, was an action brought not by a trade union, but against the union, which comes within the

British Columbia statute, and *In re Patterson, supra*, was followed. I am of the opinion that neither of these cases is applicable to the case at bar.

Furthermore, a careful perusal of The Industrial Relations and Disputes Investigation Act cited above appears to limit the proceedings which may be taken by a union as such, and defines the manner in which this may be done. In ss. 47, 52 and 61 the Act speaks of "trade union or employers' organization". If a trade union is to be found to be a legal entity under the Act, then likewise an employers' organization should be found to be a legal entity. I am clearly of the opinion that an employers' organization cannot be found to be a legal entity. Furthermore, s. 47 of the Act sets out the manner in which an application to the Board may be made by a trade union or an employers' organization as follows:

"For the purposes of this Act, an application to the Board or any notice or any collective agreement may be signed, if it is made, given or entered into. . . .

"(d) by a trade union or employers' organization, by the president and secretary or by any two officers thereof or by any person authorized for such purpose by resolution duly passed at a meeting thereof."

While a trade union may be recognized under the Act for the purpose of enforcing collective bargaining agreements or for the collection of money, or in connection with such other matters as are expressly dealt with by the Act, I cannot find that it is a legal entity for the purposes of this motion.

It is clear that a trade union does not come within the powers of a corporation to sue and be sued: see The Interpretation Act, R.S.C. 1927, c. 1, s. 30, which provides:

"In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall

"(a) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name. . . ."

With the exception of the provision in s. 47 of The Industrial Relations and Disputes Investigation Act quoted above, where it provides that a trade union shall be a person for the specific purpose of a prosecution, at no place in the Act does it say that

a union shall be a person or a body corporate for the purposes of the Act or for any other purpose.

I must therefore conclude that the applicant is not a juridical entity and that it has no legal right to bring this application.

For the above reasons the application will be dismissed.

Application dismissed.

Solicitors for the applicant: Smith, Rae, Greer, Sedgwick, Watson & Thom, Toronto.

[COURT OF APPEAL.]

Better Plumbing Company, Limited v. The City of Toronto.

Expropriation—Compensation—Principles to be Applied in Determining Amount—Necessity for Strict Adherence to Relevant Statutory Provisions—Expropriation by Municipality—Replacement Cost less Depreciation—Temporary Alterations—The Municipal Act, R.S.O. 1937, c. 266, ss. 342(c), 347(1).

Where land is expropriated by a municipality for municipal purposes the compensation payable under s. 347(1) of The Municipal Act is limited to the value to the claimant of the lands taken and an allowance for injurious affection of the lands remaining. *Re Powell and City of Toronto* (1925), 56 O.L.R. 541 at 545, applied. The addition, in 1927, of the words "and for any damage necessarily resulting from the expropriation of the land" does not extend the compensation beyond what the *Powell* case decided might be allowed as an incident of severance. *Re Conger Lehigh Coal Co. Ltd. and the City of Toronto*, [1934] O.R. 35 at 41; *Lafferty et al. v. The Public Utilities Commission of Trenton*, [1947] O.R. 307, applied. Accordingly, where, by a combination of circumstances, an owner was compelled to move into premises temporarily after they had been expropriated, and to make temporary alterations to them before doing so, *held*, the cost of these temporary alterations, and other incidental expenses, were properly rejected in assessing the compensation payable by the municipality. *The King v. W. D. Morris Realty Limited*, [1934] Ex. C.R. 140, quoted and applied; other authorities reviewed.

In determining the value of buildings expropriated the replacement cost, less depreciation, is not an independent test of value, but evidence thereof is not necessarily to be rejected altogether. *The King v. W. D. Morris Realty Limited*, *supra*, at p. 154, applied. But where there is other evidence, of a satisfactory kind and weight, on which the value can be assessed evidence of replacement cost may properly be disregarded. *The King v. Manuel Estate* (1915), 15 Ex. C.R. 381; *The King v. The Carslake Hotel Company, Limited et al.* (1915), 16 Ex. C.R. 24, and other authorities, referred to.

AN APPEAL by the claimant from an award by Barton Co. Ct. J.

13th November 1950. The appeal was heard by LAIDLAW, AYLESWORTH and BOWLBY JJ.A.

G. D. Watson, K.C. (J. A. Sweet, K.C., with him), for the claimant, appellant: In the particular circumstances it was

necessary for us to move into the expropriated premises or go out of business. [AYLESWORTH J.A.: Your contention is that if you had not moved into the premises, but had made a claim for loss of business while the other premises were being made ready, you would have been subject to criticism for not trying to mitigate your loss?] Precisely. The arbitrator erred in principle in refusing to allow the cost of moving, and the cost of the temporary alterations to the expropriated premises.

The arbitrator purported to base his award on fair market value, but he did not apply the proper principles in determining it. He made no adequate allowance for the special value of the property to us. This property differed from neighbouring properties on Yonge Street because it had a warehouse, which had a special value to us or to anyone else who needed storage room. If the building on land has a special value to the owner, that should be added to the valuation of the land. The respondent's contention was that the price paid by us some months before must govern. [AYLESWORTH J.A.: It is a factor that is not to be ignored.] Certainly, but it is not conclusive. [AYLESWORTH J.A.: You do not quarrel with the arbitrator's valuation of the land alone, do you?] No. Land on Yonge Street has a value of from \$800 to \$1,000 a foot, but this is for vacant land or land on which the buildings are to be scrapped. The arbitrator said he took that value for the land, but his figures belie the statement. The adjoining building, a corner property, which sold for \$70,000, is comparable to our property. [LAIDLAW J.A.: But the corner building had revenue-producing tenants.] The buildings were comparable, so far as potential value was concerned, and the tenants in the corner building could have been accommodated in our building if it had been altered for the purpose. [AYLESWORTH J.A.: You purchased the property at a bargain price of \$30,000. What is there to justify us in saying that the arbitrator, who allowed you \$35,000, failed to take into consideration the value of the building?] His figures show clearly that he allowed an insufficient amount for the building. He seems also to have thought that only real estate agents were competent to give evidence as to value.

The arbitrator expressly rejected, as not relevant, evidence as to replacement cost less depreciation, which is one of the accepted yardsticks for ascertaining fair market value. [LAID-

LAW J.A.: If he rejected that evidence, why did he allow any increment over what you paid?] I do not know. [LAIDLAW J.A.: It is true that he said in his reasons that he was disregarding that evidence, but he did allow you \$5,000 more than you had paid, and he must have had some basis for doing so.] [AYLESWORTH J.A.: Can you put your case any higher than this on this point—when one refers to the evidence before the arbitrator as to reconstruction cost and the value of other buildings, and the fact that he has increased your price by \$5,000, the logical conclusion is that whatever potentialities he did take into consideration, he could not have considered the element of reconstruction cost less depreciation?] That is my position.

I refer to the following authorities: The Municipal Act, R.S.O. 1937, c. 266, s. 347; Cripps on Compensation, 7th ed. 1931, pp. 108-111; *The King v. Woods Manufacturing Company Limited*, [1949] Ex. C.R. 9; *Irving Oil Company Limited v. The King*, [1946] S.C.R. 551, [1946] 4 D.L.R. 625. [LAIDLAW J.A.: The principles are quite clear; the controversy is as to whether or not the arbitrator applied the proper principles.] [AYLESWORTH J.A.: Reconstruction cost less depreciation is an element to be taken into consideration, but it is only one element. How can we say that it was not taken into consideration here?] The arbitrator definitely stated that he rejected it.

As to our right to have some allowance made for the special value of this property to us, *e.g.*, because of the existence of a rear lane, that could be used by trucks, I refer to *The King v. W. D. Morris Realty Limited*, [1943] Ex. C.R. 140.

G. A. McGillivray, K.C., for the contestant, respondent and cross-appellant): This Court will not substitute its view as to value for that of the arbitrator: *Re Scott and Town of Oshawa* (1922), 52 O.L.R. 504 at 507. [LAIDLAW J.A.: That is quite true. But what authority was there for the arbitrator to disregard the evidence as to the cost of reconstruction? Is that not an error in principle? He is required to determine the market value on the evidence given, and that evidence included the cost of reconstruction.] He surely did not mean to say that he disregarded it entirely. In any case, it is not a proper yardstick in such a case as this. It should be used for churches, schools and similar buildings that can be replaced only by building elsewhere, but not when a sale or sales of the property in question and of similar

properties in the neighbourhood are available to indicate value. [AYLESWORTH J.A.: Recent sales of comparable properties are cogent evidence regarding market value, but they are not conclusive. Reconstruction cost less depreciation cannot be ignored.] [LAIDLAW J.A.: The arbitrator says he is proceeding on a basis which he does not make plain, and that he is disregarding the evidence as to reconstruction cost.] This was not a manufacturing building, nor was such a building required. The merchandise to be stored was not much heavier than or very different from that in other buildings on Yonge Street. I refer to *The King v. Manuel Estate* (1915), 15 Ex. C.R. 381, 25 D.L.R. 626; *The King v. Imperial Bank of Canada*, [1923] 3 D.L.R. 345 at 347; *The King v. Griffin* (1916), 18 Ex. C.R. 51.

The method followed by the arbitrator here was the best method: *The King v. Woods Manufacturing Company Limited*, *supra*. The proper and best method is to determine the actual value of the property from the selling prices of comparable properties.

The valuation must be made as of the date when the expropriating by-law was passed: *Re Forbes and City of Toronto*, 65 O.L.R. 34, [1930] 2 D.L.R. 650.

The cost of the temporary alterations in the expropriated premises, and of the move, etc., were properly excluded. The appellant could have moved into 641' Yonge Street when its lease expired if it had been satisfied to carry on on the same scale as it did in the expropriated premises. Compensation may include only those elements specifically allowed by statute, and our definition of "land", in s. 342(c) of The Municipal Act, is narrower than that applied in the cases in the Exchequer Court, and does not include such elements: *Re Powell and City of Toronto*, 56 O.L.R. 541, [1925] 2 D.L.R. 796; *Re Conger Lehigh Coal Co. Ltd. and the City of Toronto*, [1934] O.R. 35, [1934] 1 D.L.R. 476; *Lafferty et al. v. The Public Utilities Commission of Trenton*, [1947] O.R. 307, 61 C.R.T.C. 104; *The King v. Moreau* (1921), 21 Ex. C.R. 82, 62 D.L.R. 300. The appellant spent a great deal of money for temporary repairs, and the arbitrator said that in view of its increased earnings, its losses were probably not as great as it indicated.

The award, if the basis adopted by the arbitrator is the correct one, is excessive, and should be reduced by this Court.

G. D. Watson, K.C., in reply.

Cur. adv. vult.

26th February 1951. The judgment of the Court was delivered by

LAILAW J.A.:—This is an appeal by the claimant from an award dated the 3rd April 1950, made by His Honour Judge Barton as Official Arbitrator under the provisions of The Municipal Arbitrations Act, R.S.O. 1937, c. 280, whereby he ordered the contestant to pay to the claimant the sum of \$38,000 as full compensation for certain lands taken by the contestant, including all damages sustained by reason of the expropriation thereof. The contestant gave notice of intention to argue on the hearing of the appeal that the award should be varied on the ground that the amount is excessive and that in the circumstances no amount should have been allowed for compulsory taking.

The claimant, Better Plumbing Company, Limited, carried on the business of a plumbing and heating contractor and as a retail dealer in heating supplies and electrical and gas appliances on premises leased by it and situate on Dundas Street West, in the city of Toronto. The term of the lease ended on the 14th April 1949. The claimant intended to vacate and to move its place of business upon termination of the term of the lease and on 2nd September 1948 it purchased premises known as 497-499 Yonge Street in the city of Toronto. The claimant planned to alter those premises to make them suitable for the purposes of its business. Before the commencement of the work of alteration, the council of the city of Toronto passed a by-law, no. 17447, on 30th November 1948 and expropriated the land and premises acquired by the claimant. The City did not enter into or require immediate possession. The claimant thereafter purchased other premises known as 641 Yonge Street and extensive alterations were necessary to make those premises suitable as a place of business for the claimant. The alterations were commenced, but before they were completed, and before the premises were ready for occupation, the term of the lease of the premises occupied by the claimant on Dundas Street expired. The claimant endeavoured to find other premises for

temporary occupation until completion of the alteration to the building on the land purchased by it at 641 Yonge Street. It was unable to find such accommodation and therefore moved into the premises at 497-499 Yonge Street. Before doing so, it made alterations to them of a temporary nature. At the time of the hearing before the Official Arbitrator, 27th March 1950, the claimant was still in occupation of the premises 497-499 Yonge Street and the alterations to the premises at 641 Yonge Street were not completed and the building was not ready for occupation.

The claimant claimed, as part of the compensation payable to it by the contestant, the cost of the alterations made by it to the premises at 497-499 Yonge Street, together with the cost of moving from Dundas Street to 497-499 Yonge Street, the expense of advertising the change of address, the cost of new stationery, and other incidental expenses. The claim for these amounts was not allowed by the Official Arbitrator. The claimant now complains that the Official Arbitrator erred in refusing to allow the claim for those items and erred in particular in the manner and amount of the assessment of compensation payable to it by the contestant.

Where land is expropriated under the authority of a statute, as in the present case, the right to compensation is stated in Halsbury's Laws of England, 2nd ed. 1932, p. 37, para. 35, as follows:

"The right to receive compensation for land taken or injuriously affected depends on the provisions of the statute or order which authorizes the taking or injurious affection, and upon the terms of such statute or order will also depend the basis upon which the compensation is to be assessed."

The relevant statutory provision imposing liability on the contestant in this case to make due compensation to the appellant, upon which the basis of the assessment of such compensation depends, is s. 347(1) of The Municipal Act, R.S.O. 1937, c. 266, which I quote as follows:

"Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corpo-

ration shall make due compensation to the owner for the land expropriated and for any damage necessarily resulting from the expropriation of the land, or where land is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected."

The words in that section, "and for any damage necessarily resulting from the expropriation of the land", were added to the section in 1927 by the Act 17 Geo. V, c. 61, s. 30. But it has been held in *Re Conger Lehigh Coal Co. Ltd. and the City of Toronto*, [1934] O.R. 35, [1934] 1 D.L.R. 476, per Kerwin J. at p. 41, that the amendment is restricted to damage resulting from the expropriation of the land and does not cover any damages beyond what *Re Powell and City of Toronto*, 56 O.L.R. 541, [1925] 2 D.L.R. 796, had determined might be allowed as an incident of severance. In both cases mentioned the Court refused to allow a claim for loss of business as part of the compensation payable to the owner under s. 347 of The Municipal Act. *Re Conger Lehigh Coal Co. Ltd. and the City of Toronto* was referred to and quoted with approval by this Court in *Lafferty et al. v. The Public Utilities Commission of Trenton*, [1947] O.R. 307, 61 C.R.T.C. 104.

I turn then to *Re Powell and City of Toronto* for a statement of the basis for determination of the amount of compensation payable by the contestant under s. 347 of The Municipal Act. Middleton J.A. at p. 545 says: "... the statute ... does not warrant the making of allowances for anything beyond the value to the claimant of the lands taken and for the injurious affection of the lands remaining. ... "

Later, at p. 548, he quotes the words of Lord Halsbury in *Commissioners of Inland Revenue v. Glasgow and South-Western Railway Company* (1887), 12 App. Cas. 315 at 320-1, including the following statement: "The two things, and the only two things, which are within the ambit and contemplation of the statute, are the value of the lands and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them. ... "

In the present case, the only thing which the Official Arbitrator could properly assess and include as compensation to the

claimant for the land expropriated by the contestant was the value to the claimant of the expropriated lands. The basis of assessment was precisely stated in *In re Lucas and The Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, and the cardinal principle was quoted therefrom in *The King v. W. D. Morris Realty Limited*, [1943] Ex. C.R. 140 at 146, as follows: "The owner receives for the lands he gives up, their equivalent, i.e. that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser."

In *The King v. W. D. Morris Realty Limited*, *supra*, Thorson P. refers also at p. 148 to *Cedars Rapids Manufacturing and Power Company v. Lacoste et al.*, [1914] A.C. 569, 16 D.L.R. 168, 6 W.W.R. 62, and says that in that case Lord Dunedin makes it clear that the value to the owner cannot be fixed apart from the price that the property could have been sold for to some purchaser other than the takers under compulsory powers if it had been exposed for sale. Again, quoting Shearman J. in *Sidney v. North Eastern Railway Company*, [1914] 3 K.B. 629, it is said:

"The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to."

Finally, it is well settled that the value of the land should be fixed as of the date of passing of the by-law expropriating it: *Re Forbes and City of Toronto*, 65 O.L.R. 34 at 37, [1920] 2 D.L.R. 650.

When the principles as stated are applied to the present case, it appears plain to me that the items in controversy cannot be allowed as part of the compensation payable by the contestant to the claimant. The cost of making alterations to the premises at 497-499 Yonge Street after expropriation of them by the contestant and notwithstanding that such alterations were necessary for the purpose of temporary occupation by the claimant to enable it to continue its business, cannot properly be included as an item of value of the lands to the owner at the date that the by-law expropriating the land was passed. Likewise the cost of moving into the premises, and other incidental expenses

to the claimant, cannot be regarded as items which can be properly taken into account by the Official Arbitrator.

Counsel for the appellant referred to *Irving Oil Company Limited v. The King*, [1946] S.C.R. 551, [1946] 4 D.L.R. 625, amongst other cases. But it is apparent at once, from the judgment of Rand J. in particular at p. 560, that the decision in that case depended upon, and must be read with, the special statutory provisions applicable to the case under consideration by the Court. The statutory definition of the word "land" included "damages". It was pointed out clearly that the word "damages" was "intended to cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause". There is no such comprehensive definition of "land" in The Municipal Act. On the contrary, the definition as contained in s. 342(c) of The Municipal Act is as follows: "'Land' shall include a right or interest in, and an easement over, land." Using the language of Middleton J.A. in *Re Powell and City of Toronto*, *supra*, at p. 547: "I desire to emphasise the exact words of the statute and to point out how widely it differs from other statutes which direct that there shall be due compensation to the owner for the taking of his land or due compensation to the owner for the loss sustained by the exercise of the powers of expropriation. For some reason that is not what the Legislature has given. All it has given is due compensation to the owner for the land expropriated."

It is my opinion that the Official Arbitrator was right in refusing to allow the claims made by the owner for the cost of alterations made by it after the date of the by-law expropriating the land and for moving expenses and other incidental expenses. This ground of appeal must therefore fail.

Counsel for the appellant argued also, as appears from the memorandum filed by him: "... that the Award is inadequate in the circumstances because evidence of replacement value, less depreciation, was disregarded, because no adequate allowance was made for the special value of the property to the Appellant and the best possible use of the property, because the Arbitrator acted on an assumption that only real estate experts could tell what the property was worth, because the Arbitrator disregarded evidence as to the significance of available floor space

in computing value, because the Arbitrator accepted false standards of market or selling value of ordinary stores, in giving undue weight to evidence based on some sales where value of buildings was not significant and in disregarding significant evidence of comparable sales, because adequate weight was not given to the significance of the purchase by the T.T.C. of the adjoining property at 495 Yonge Street for \$70,000, because undue weight was attached to the evidence of experts who were unduly influenced by the price paid by Better Plumbing Company, Limited for the property, . . . and because the Arbitrator allowed the increase in Appellant's 1949 receipts over 1948 receipts to influence his decision as to the damage sustained by the appellant."

I have given much study and consideration to each of the grounds of appeal advanced by counsel in argument as quoted from memorandum filed by him. However, I cannot give effect to any of them.

It is quite true that the Official Arbitrator in his written reasons stated that he disregarded the evidence as to the reconstruction cost of the buildings and stated that such evidence was not relevant. I think the learned and experienced Official Arbitrator did not intend to state as a principle or rule that such evidence is never relevant or admissible in any case where land is expropriated and the amount of compensation payable to the owner is to be determined. While such evidence is not an independent test of value it does not follow that it should be rejected altogether: per Thorson P. in *The King v. W. D. Morris Realty Limited*, *supra*, at p. 154. The learned Official Arbitrator admitted the evidence as part of the claimant's case and in so doing must have regarded it as relevant evidence notwithstanding part of a statement made by him in his written reasons for the award. When I read the whole statement and reasons, it appears abundantly plain that he meant to say that there was other evidence of a satisfactory kind and weight in the case upon which he could base his assessment of the value of the land. I venture to think that if the learned Official Arbitrator had given effect in the present case to the evidence as to the reconstruction cost of the building less depreciation, there would be substantial ground upon which to found a complaint that he was in error in so doing. I refer in this connection to

The King v. Manuel Estate (1915), 15 Ex. C.R. 381, 25 D.L.R. 626 (affirmed by the Supreme Court of Canada, 29th December 1915, unreported), followed in *The King v. The Carslake Hotel Company, Limited et al.* (1915), 16 Ex. C.R. 24, 34 D.L.R. 273 (affirmed by the Supreme Court of Canada, 13th June 1916, unreported); also to *The King v. Imperial Bank of Canada*, [1923] 3 D.L.R. 345 at 346-7 and *The King v. Edwards*, [1946] Ex. C.R. 311 at 326.

I am not satisfied that there was any error on the part of the Official Arbitrator in his consideration of the evidence or the weight of it or in the application of the proper principles for determination of the amount of compensation payable by the contestant in this case. On the contrary, it is my view that he proceeded properly to consider and weigh the evidence and that he applied the proper principles of law. I cannot give effect to any ground of appeal advanced in argument by counsel on behalf of the appellant.

Counsel for the contestant has not satisfied me that the award is excessive or that the Official Arbitrator erred in making an allowance for compulsory taking of the land.

The appeal should be dismissed with costs. The application made by the contestant to vary the award should be dismissed without costs.

*Appeal dismissed with costs; cross-appeal dismissed
without costs.*

*Solicitor for the claimant, appellant: Joseph A. Sweet,
Hamilton.*

*Solicitor for the contestant, respondent: Irving S. Fairty,
Toronto.*

[COURT OF APPEAL.]

Cresswell v. The Etobicoke-Mimico Conservation Authority.

Municipal Corporations—Conservation Authorities—Expropriation of Land and Compensation therefor—Advisory Board—Invalidity of Action by Majority of Board—Necessity for Reasons for Award—The Conservation Authorities Act, 1946 (Ont.), c. 11, ss. 9(2), 20(3), (4), (5), (6), (9).

It is not a compliance with s. 20(4) of The Conservation Authorities Act, 1946, for two members of an advisory board appointed under the statute to do alone, and without reference to the third member, what the whole board is required to do. Nor is an award valid if the advisory board fails to give written reasons, as expressly required by the subsection. Such a board, in spite of its name, does much more than advise or recommend, and it is in reality a board of arbitrators or so analogous to a board of arbitrators that, unless the Act otherwise provides, well-established principles applicable to arbitration should be applied to its decisions. Clearly where an issue is to be determined by a board of three arbitrators it is not permissible for two of the arbitrators to ignore the third and proceed in his absence, and an award so made would unquestionably be bad. *United Kingdom Mutual Steamship Assurance Association v. Houston & Co.*, [1896] 1 Q.B. 567; *Cameron v. Cuddy et al.*, [1914] A.C. 651, applied.

APPLICATIONS for extension of time and for leave to appeal and AN APPEAL from an order of the Ontario Municipal Board. (The argument is reported only in so far as it deals with the merits of the appeal.)

25th September 1950. The applications and the appeal were heard by LAIDLAW, ROACH and GIBSON JJ.A.

H. F. Parkinson, K.C., for the claimant, appellant: The advisory board is a tribunal, and was required to act judicially. On the face of the proceedings it is apparent that it did not proceed according to the statute. It purported to act by a majority, and in the absence of one of its three members, which it had no power to do. There is no statutory authority for a quorum, or for the taking of any action otherwise than by the full board. Further, the advisory board did not give written reasons, and neither the Municipal Board nor this Court can decide on what grounds it proceeded in assessing the compensation. The duties of an advisory board are set out in subss. 3 and 4 of s. 20 of The Conservation Authorities Act, 1946 (Ont.), c. 11.

Where a board is exercising judicial functions it must proceed like a Court, notifying the parties and hearing any evidence offered: *Re Brown and Brock and the Rentals Administrator*, [1945] O.R. 554, [1945] 3 D.L.R. 324; *Spackman v. The Plumstead District Board of Works* (1885), 10 App. Cas. 229; *Local*

Government Board v. Arlidge, [1915] A.C. 120. That was not done here. The board did not perform its functions in a judicial way. [LAIDLAW J.A.: That was not a matter that the Municipal Board could decide on appeal.] No. [LAIDLAW J.A.: Then was an appeal your proper remedy? Should you not have proceeded by prohibition or *certiorari*?] The Municipal Board has no original jurisdiction whatever.

Since the advisory board had no jurisdiction to make its finding, that finding was a nullity and there was nothing to come before the Municipal Board and it had nothing to act on. The matter should be remitted to the advisory board for action. I refer to *Quance v. Thomas A. Ivey & Sons, Limited*, [1950] O.R. 397, [1950] 3 D.L.R. 656; *The Town of Brampton v. Hutchinson et al.*, [1950] O.R. 491; *The City of Toronto v. The Ontario Jockey Club Limited*, [1950] O.R. 571, [1950] 3 D.L.R. 730; *Toronto Corporation v. York Corporation*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452.

The Municipal Board did not take into consideration the special value of this property to the claimant. There is no judicial authority to say that an arbitrator, after fixing the value of property, *must* add 10 per cent. for forcible taking, but it is said that a percentage *may* be added: 3 C.E.D. (Ont.), 2nd ed. 1950, p. 342. The 10 per cent. has received judicial approval in *The King v. Thomas Lawson & Sons Limited*, [1948] Ex. C.R. 44, [1948] 3 D.L.R. 334, 62 C.R.T.C. 277. The advisory board made no allowance for compulsory taking.

[LAIDLAW J.A.: If the Municipal Board had no jurisdiction, how do you get here? In the *Quance* case, *supra*, this Court said that the Municipal Board had no jurisdiction and therefore that it would not entertain the appeal.] In the *Jockey Club* case, *supra*, this Court reversed a decision of the Municipal Board.

There are other grounds on which I contend that the decision of the Municipal Board was wrong. It awarded costs payable to itself, and acted on wrong legal principles.

G. W. Mason, K.C., for the respondent: The claimant himself appealed to the Municipal Board. He apparently accepted its jurisdiction, and cannot now object that it had none. If he felt that the Board lacked jurisdiction he should have proceeded by *certiorari* or otherwise, rather than by appeal. Nor can the

claimant now say that the Municipal Board had no jurisdiction to hear the matter *de novo*, since he himself called witnesses before that Board. [ROACH J.A.: Does that put him out of this Court? If the Municipal Board lacked jurisdiction, does that affect the position?] This Court is being asked for leave to appeal from what the appellant himself says is a nullity.

An advisory board is not a judicial body. The cases cited for the appellant are not applicable to it. They are all covered in *Re Ness and Incorporated Canadian Racing Associations*, [1946] O.R. 387, [1946] 3 D.L.R. 91, 1 C.R. 453.

I ask leave to file authorities as to the right of two members of the board to act.

The advisory board did give written reasons. They stated in their report that they had viewed the premises and that in their judgment \$6,000 was a fair and just price. That is a reason.

There is a very great distinction between this case and the *Quance* case, *supra*. The *Quance* case was a pure question of law. What we are dealing with here is not a matter of assessment, but one of compensation. Neither before nor since Confederation has the determination of compensation, in cases of expropriation, been within the jurisdiction of the superior Courts; it has always been dealt with by other tribunals. The *Jockey Club* case, *supra*, is not an authority in this case; it dealt with the amount of a valuation, and raised no question of jurisdiction, as in the *Quance* case.

O. Martineau and Sons, Limited v. City of Montreal et al., [1932] A.C. 113, [1932] 1 D.L.R. 353, [1932] 1 W.W.R. 302, 52 Que. K.B. 542, and a number of other cases are discussed in *Re The City of Toronto and The Township of York*, [1937] O.R. 177, [1937] 1 D.L.R. 175, 46 C.R.C. 55, affirmed *sub nom. Toronto Corporation v. York Corporation*, *ubi supra*.

It is true that the Municipal Board has no power to consider matters of law in the abstract, but here all that was dealt with was a matter of compensation.

The advisory board did all it was obliged by the statute to do. The appeal to the Municipal Board was taken at the instance of the claimant, and the hearing *de novo* there was also at his instance. No costs were awarded. The Board has a practice of

charging a small fee to cover expenses, and the claimant was also asked to pay the stenographer's charges.

[In a written memorandum, filed after the argument, counsel submitted the following authorities in support of the proposition that the majority of the advisory board had authority to act in the absence of the third member: The Conservation Authorities Act, 1946 (Ont.), c. 11, ss. 4(3), 9(2), 20(4); 8 Halsbury, 2nd ed. 1933, pp. 8, 54; *Hascard v. Somany* (1693), 1 Freem. K.B. 504, 89 E.R. 380; *Attorney General v. Davy* (1741), 2 Atk. 212, 26 E.R. 531; *Anon.* (1731), 2 Barn. K.B. 74, 94 E.R. 365; *Rex v. Varlo* (1775), 1 Cowp. 248, 98 E.R. 1068; *The King v. Bower* (1823), 1 B. & C. 492, 107 E.R. 182.]

H. F. Parkinson, K.C., in reply: The respondent's argument that the advisory board was not a judicial body shows that this appeal involves a question of law as to jurisdiction, and under s. 20(9) of The Conservation Authorities Act leave to appeal to this Court may be given on a question of law or of jurisdiction.

Cur. adv. vult.

1st March 1951. The judgment of the Court was delivered by

ROACH J.A.:—The appellant applied to this Court: (a) for an order extending the time to appeal to this Court from an order of the Ontario Municipal Board purporting to be made under s. 20(9) of The Conservation Authorities Act, 1946 (Ont.), c. 11; (b) for leave to appeal to this Court from the said order; and (c) by way of an appeal from the said order.

On the motions for an extension of time to appeal and for leave to appeal, this Court reserved its decisions, and the appeal was then argued on its merits and judgment was reserved.

The decision of the Ontario Municipal Board in question is dated 28th June 1950. Section 20(9) of the Act provides that an appeal shall not lie to this Court unless leave to appeal is obtained from this Court "within one month after the making of the order or decision sought to be appealed from, or within such further time as the Court under the special circumstances of the case shall allow".

Long vacation made it impossible for the appellant to obtain leave to appeal within one month after the making of the order, and the earliest date thereafter when he could apply for such

leave was 11th September, being the date upon which this Court first sat after vacation. This application was set down for hearing on that date. In these circumstances, the application for an extension of time should be granted.

Section 20(9) of the Act limits the right of appeal from the Ontario Municipal Board to this Court to those cases in which a question of jurisdiction or any question of law is involved, and then only with the leave of this Court. In my opinion, this appeal involves both a question of law and a question of jurisdiction, and leave to appeal should be granted. What those questions are will appear as I discuss the merits of the appeal.

The respondent is a body corporate established under s. 4 of the Act.

The respondent, apparently in conformity with the relevant sections of the Act, acquired by expropriation certain lands of the appellant, being composed of part of lot 5 on the south side of Queen Street in the town of Brampton, according to registered plan no. BR/5. The amount of compensation to be awarded to the appellant remained to be decided.

The Act prescribes the procedure for determining the quantum of compensation. The relevant sections are as follows:

Section 9(2): "An authority may appoint one or more advisory boards."

Section 20(3): "Upon the expiration of the time indicated in the notice [of expropriation] an advisory board shall consider and determine the amount of compensation payable."

Section 20(4): "The advisory board shall, in every case where it is called upon to determine the amount of compensation payable, file with the authority a statement of the amount of compensation it finds to be payable, together with written reasons for each finding."

Section 20(5): "Within one month of the filing of such statement and reasons the authority shall cause a notice to be sent by prepaid registered mail to the person claiming compensation advising him of the amount of compensation determined by the advisory board."

Section 20(6): "Any person who is dissatisfied with the amount of compensation found to be owing to him by the ad-

visory board may, within one month of the mailing of such notice, notify the authority in writing that he is dissatisfied with such finding and desires to appeal to the Ontario Municipal Board."

Under date 15th December 1949 the respondent by resolution appointed an advisory board for the purpose of the acquisition of land for what is referred to therein as "the Brampton Scheme". That scheme included the acquisition of the appellant's land. That resolution named Messrs. Beck, Carter and Wardlaw as the members of the advisory board. The appellant complains, *inter alia*, of two matters, which follow:

First, a written statement dated 2nd March 1950, signed by two members of the board only, Messrs. Beck and Wardlaw, was filed with the respondent by them on or about the date that the statement bears. From what is contained in that statement, it is plain enough that the whole board had not considered the question of compensation. That statement says, in part, as follows:

"We the undersigned Members of the Advisory Board appointed by The Etobicoke-Mimico Conservation Authority to consider and determine the amount of compensation payable, having duly met and viewed the premises report as follows;—

"WE RECOMMEND compensation in the amount of \$6000.00 as we believe in our judgment this to be a fair and just price."

Secondly, apart from what is contained in the extract from the statement which I have just quoted, no written reasons for fixing the amount of compensation at \$6,000 were filed with the respondent.

In my opinion, those two complaints are well taken.

It was not a compliance with s. 20(4) for two only out of the three members of the advisory board to do what the whole board is thereby required to do. The board is called an "advisory board". It would seem to me on the plain wording of the Act that the board does much more than advise or recommend. Its function is to decide. Section 20(4) refers to the compensation which the advisory board "finds to be payable", and s. 20(5) refers to the amount of compensation "determined by the ad-

visory board". There is nothing in the whole scheme of the Act, as I read it, by which the authority has any power to pay more or less than the amount as fixed by the advisory board. If the owner of the land which has been expropriated is dissatisfied with that amount, the only relief open to him is by way of an appeal to the Ontario Municipal Board. In reality, the advisory board is a board of arbitrators or, at the very least, so analogous to a board of arbitrators that, unless the Act otherwise provides, well-established principles applicable to arbitration should be held to apply to its decisions. No one would suggest, and, if they did, I would certainly disagree, that where an issue is to be determined by a board of three arbitrators, either under a statute or pursuant to a submission, two of them could ignore the third and proceed in his absence. Such an award would unquestionably be bad: *United Kingdom Mutual Steamships Assurance Association v. Houston & Co.*, [1896] 1 Q.B. 567; *Cameron v. Cuddy et al.*, [1914] A.C. 651, 13 D.L.R. 757, 5 W.W.R. 56, 25 W.L.R. 236.

Even if the three members of this advisory board had functioned in making an award, they would have been required by s. 20(4) to give reasons for their findings, and in my opinion the omission to give written reasons would have been fatal.

There was no finding by the advisory board as required by the Act, and the subsequent appeal to the Municipal Board did not cure that legal deficiency.

The jurisdiction of the Municipal Board on an appeal is contained in s. 20(9). The Board has "authority to review the finding of the advisory board and to increase, decrease, otherwise vary or confirm such findings, or [it] may refer the matter back to the advisory board . . ." Its jurisdiction in this connection is appellate and not original. It could not review, increase, decrease, otherwise vary or confirm a finding that had never been made.

For the foregoing reasons, this appeal should be allowed with costs, the order of the Municipal Board set aside and the matter remitted to the advisory board.

For the guidance of the advisory board, I should say that in my opinion the appellant is entitled to appear before that board and be heard, together with any witnesses whom he desires to

call, and that the board should not make its findings until the appellant has been heard by it.

Appeal allowed with costs.

Solicitors for the claimant, appellant: Parkinson, Gardiner, Willis & Roberts, Toronto.

Solicitors for the respondent: Mason, Foulds, Arnup, Walter & Weir, Toronto.

[COURT OF APPEAL.]

Re Cox.

Charities — Charitable Bequests — Validity — Perpetuity — Necessity for Benefit of Public or Appreciable Section thereof—"Poor relations" Cases—Inapplicability of English Extension of Exception in Ontario.

For a bequest, that would otherwise be void as offending the rule against perpetuities, to be valid as a charitable bequest, within any of the four classes set out in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 583, it is essential that it should be for the benefit of the public or an appreciably important section of the public. *Verge v. Somerville et al.*, [1924] A.C. 496 at 499, applied. The sole exception to this rule that can be recognized in Ontario is the class of cases known as the "poor relations" cases, and this class is closed, and no other case not entirely identical with the decided cases should be adopted into it; their validity is now recognized solely because of their respectable antiquity. There is no second exception in the case of trusts for the relief of poverty among a group of private individuals (even if the composition of the group is fluctuating) chosen by the donor as employees, or dependants of employees, of a particular employer. The line of English cases beginning with *Spiller v. Maude* (1881), 32 Ch. D. 158*n*, and ending with *Gibson et al. v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177, should not be followed in Ontario. The first inquiry in every case of a charitable trust (with the single exception of the "poor relations" cases) must be whether the gift is for the benefit of the public, and in making that inquiry one does not look at the nature or quality of the gift, but only at the description of the beneficiaries.

Judgment of Wells J., [1950] O.R. 137, reversed.

AN APPEAL by the next-of-kin from the judgment of Wells J., [1950] O.R. 137, [1950] 2 D.L.R. 449.

8th and 9th May 1950. The appeal was heard by ROACH, AYLESWORTH and BOWLBY JJ.A.

J. D. Arnup, K.C., for Margaret J. Ardagh, appellant, and, by appointment, other next-of-kin in the same interest: The sole question in this appeal is as to the validity of a perpetual trust. The precise point is one of first impression in Canada and is one of great importance. We are all on common ground that if the trust in question is not valid as a charitable trust, it is invalid as offending the rule against perpetuities, and the result will be an intestacy.

Since the judgment in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, charitable trusts have been grouped under four heads, including trusts for the relief of poverty and trusts for educational purposes. It has been an accepted principle that a trust, to be valid as a charitable trust under any of the four heads, must be for a public purpose, that is, it must be beneficial to the community or a substantial

portion thereof. The approach a Court will make to decide such a question of validity is indicated in such cases as *Verge v. Somerville et al.*, [1924] A.C. 496 at 499, and *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 at 41, 46, 52, 58, 65, [1947] 2 All E.R. 217. The legal significance of the word "charity" is narrower than common usage, and the overriding test would appear to be that of public benefit: *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447 at 457-8, [1947] 1 All E.R. 513. The trend towards limiting the extent to which the Courts will go in upholding charitable bequests begins to appear in the late 1920's, and important cases in this connection are *In re Hobourn Aero Components Limited's Air Raid Distress Fund*; *Ryan v. Forrest*, [1946] Ch. 194, [1946] 1 All E.R. 501, and *Gilmour v. Coats et al.*, [1949] A.C. 426 at 442, [1948] 1 All E.R. 848.

There are two exceptions to the general rule which appear to create anomalies: (a) trusts for the benefit of inhabitants of a particular locality, as discussed in the *Williams' Trustees* case, *supra*, at p. 459, and (b) the "poor relations" cases, discussed in *In re Compton; Powell v. Compton et al.*, [1945] Ch. 123 at 137, [1945] 1 All E.R. 198. A question has arisen in England as to whether there is a third exception, in cases of trusts for the relief of poverty, discussed in *Gibson et al. v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177, [1949] 2 All E.R. 985. The question here appears to be: Can a gift in perpetuity for the benefit of employees of a named employer be considered to be for a public purpose? When this motion was first argued before Wells J. the weight of authority seemed to indicate that such a trust as this was not for the public benefit, and therefore not charitable, but after the argument judgment was delivered in the *South American Stores* case, *supra*. There appear to be only six earlier cases for consideration in this connection.

In *In re Gosling; Gosling v. Smith* (1900), 48 W.R. 300, it was held that the fact that the gift was limited to a particular section of the community did not render void an otherwise valid charitable bequest, but this appears to be no longer good law, and has been overruled. There were further decisions in *In re Drummond; Ashworth v. Drummond*, [1914] 2 Ch. 90, and *Re Rayner; Cloutman v. Regnart* (1920), 122 L.T. 577. In the latter of these cases no one appeared to argue that the trust was bad,

and the judgment has been overruled, particularly in so far as it purports to define a section of the public. In *In re Compton*, *supra*, it was said at p. 126 that the mere number of persons to be benefited could not make such a trust a public one, and at pp. 129, 130 and 139 the question of relief of poverty is discussed. The next two cases in chronological order are *In re Tree*; *Idle v. Tree*, [1945] Ch. 325, [1945] 2 All E.R. 65, and *In re Hobourn Aero Components Limited's Air Raid Distress Fund*, *supra*. The *Hobourn* case is distinguishable from the case at bar in that there the Court relied on the fact that the employees had paid into the fund for their own benefit. In that case it was submitted that the *Drummond* case, *supra*, was wrongly decided. In the unreported case of *In re Sir Robert Laidlaw's Trusts* (1935), the question arose whether the will disclosed a general charitable intention.

In the present case, although the trust is expressly stated to be for charitable purposes, the money is limited to benefit a named class only. If that class cannot be benefited, there is nothing to show an intention to benefit the public generally.

To sum up the conclusions to be drawn from the cases, where the trust is not expressed to be for the relief of poverty, (1) a trust for employees of a named employer is not valid because it is not sufficiently public; (2) the number of possible beneficiaries does not matter: see *In re Compton*, *supra*, at p. 131; (3) the rational basis of the first main principle is that invalidity stems from connection with a named *propositus*, either an individual or a corporation (as here, where everyone must derive his right from some connection with The Canada Life Assurance Company); (4) the fact that the class is enlarged by adding persons further removed from the named *propositus* does not change the position.

Were it not for the *South American Stores* case, *supra*, this trust would, I submit, be clearly invalid, and both that case and the *Laidlaw* case, *supra*, are distinguishable in that in each of them the trust is expressed to be for the relief of poverty. The judgment of Wells J. seems to indicate that because the trust opens with a statement that it is for general charitable purposes only, the Court should look for a use that would be charitable, despite the absence of the element of public benefit. The only possibility here would be the relief of poverty, and Wells J. held that the trust was valid in so far as that was its purpose. As to

this, I have two submissions: (1) To adopt that reasoning is to rewrite the trust instrument, since it imposes limitations that the testator did not impose on the trustees: *Tudor on Charities*, 5th ed. 1929, pp. 67-70; *In re Eades; Eades v. Eades*, [1920] 2 Ch. 353. (2) This Court should not follow the *South American Stores* case, but should decide the matter on the basis of the broad principle that the English Court of Appeal might have followed if it had not been bound by its own unreported decision. The law in England has developed into a well-defined principle, but recognizes two somewhat anomalous exceptions. This Court is not bound by the *Laidlaw* case or the *South American Stores* case, and should decide that the mere fact that a trust is for the relief of poverty does not make it an exception to the general rule requiring the element of public benefit.

F. T. Watson, K.C., for the Official Guardian, representing infants and unascertained persons: I adopt Mr. Arnup's argument, and emphasize that both the *Laidlaw* case and the *South American Stores* case are distinguishable, because in each of them there was specific mention of the relief of poverty, and there is no such reference here.

H. J. McLaughlin, K.C. (*W. D. S. Morden*, with him), for next-of-kin of Mrs. Cox, appellants: This trust cannot be upheld unless it is shown to be for the public benefit, as laid down in *Verge v. Somerville et al.*, [1924] A.C. 496; *In re Compton; Powell v. Compton et al.*, [1945] Ch. 123, [1945] 1 All E.R. 198; and *In re Hobourn Aero Components Limited's Air Raid Distress Fund; Ryan v. Forrest*, [1946] Ch. 194, [1946] 1 All E.R. 501. We do not disagree with the trial judge's references to the "poor relations" cases, but do not consider them applicable in this case. The whole will emphasizes the personal character of the gift. *Spiller v. Maude* (1881), 32 Ch. D. 158n; *In re Gosling; Gosling v. Smith* (1900), 48 W.R. 300; and *In re Buck*, [1896] 2 Ch. 727, are anomalous, and were all decided before *In re Compton* and the *Hobourn Aero Components* case, *supra*. *Gibson et al. v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177, [1949] 2 All E.R. 985, can be reconciled with the other decisions only if one treats the relief of poverty as in itself sufficient to give the necessary public character, or make that character unnecessary, and if the judgment below is correct it makes nonsense of the *Compton* case. If these trusts are valid, then

surely both those in *In re Drummond*; *Ashworth v. Drummond*, [1914] 2 Ch. 90, and those in the *Hobourn Aero Components* case should have been upheld.

There is nothing here to suggest that the trusts are for the relief of poverty, and in any case there is nothing in our law to support a trust for any charitable purpose unless it is first shown to be for the benefit of the general public. It is evident from *In re Eades*; *Eades v. Eades*, [1920] 2 Ch. 353, that the Court will not rewrite the will to make the trust one only for the relief of poverty. To affirm this judgment would be to create new law and widen the category of charitable trusts, thus setting a dangerous precedent.

J. J. Robinette, K.C. (*J. W. Blain*, with him), for the directors of The Canada Life Assurance Company and, by appointment, for a representative of the employees, respondents: To apply the interpretation given by Wells J. is not to rewrite the will. The testator said that the money was to be used for charitable purposes within a designated class. He did not mention education or religion, and if, as a matter of law, the only charitable purpose that is legal in the circumstances is the relief of poverty, then the gift should be interpreted as being for that purpose. The others may not be charitable purposes *qua* the class.

A charitable trust never fails for uncertainty, although a philanthropic trust may do so; here the area of selection is not beyond the bounds of a legal charity: see *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson et al.*, [1944] A.C. 341 at 348, 350-1, 363. "Charitable" is a technical word, and the test is set out in the *Chichester* case at pp. 369-71. All that *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, did was to give an index to the variety of trusts covered by the statute 43 Eliz., c. 4. When a Court is construing a will it will seek to avoid an intestacy and to carry out the intention of the testator. A general direction to apply a trust fund for charitable purposes has been held valid: *Re Stewart* (1925), 28 O.W.N. 479.

It is true that in the case of some charitable purposes there must be an element of public benefit, but see *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 at 42, [1947] 2 All E.R. 217, per Lord Wright. In *Gilmour v. Coats et al.*, [1949] A.C. 429 at 449, [1949] 1 All E.R. 848, it is

said that the same rule applies to a religious trust. All the cases that have been discussed recognize the relief of poverty among relations or employees of a named *propositus* as a valid charitable purpose. *In re Gosling*; *Gosling v. Smith* (1900), 48 W.R. 300; *Spiller v. Maude* (1881), 31 Ch. D. 158n; *Re Rayner*; *Cloutman v. Regnart* (1920), 122 L.T. 577, have never been overruled, and as is pointed out in *Gibson et al. v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177, [1949] 2 All E.R. 985 at 994-5, testators and their advisers rely upon the decided cases and those cases should not be lightly overruled. *In re Drummond*; *Ashworth v. Drummond*, [1914] 2 Ch. 90, was correctly decided on its facts, for no one could say that a trust for holidays could be a charitable trust. Relief of poverty, even within a named class, necessarily implies a benefit to the public generally.

The development of the law as to charities is not based on logic, and Lord Greene M.R. tried to make it so, and went beyond the facts actually before him in *In re Compton*; *Powell v. Compton et al.*, [1945] Ch. 123, [1945] 1 All E.R. 198, and *In re Hobourn Aero Components Limited's Air Raid Distress Fund*; *Ryan v. Forrest*, [1946] Ch. 194, [1946] 1 All E.R. 501, in neither of which cases can there be any quarrel with the actual decision. The *South American Stores* case is directly in point, and there is no suggestion in that case that the Court would have reached a different conclusion if it had not been bound by earlier decisions. The language of Lord Greene M.R. cannot be carried to its logical conclusion.

I refer also to *Re Ontario Bank Pension Fund* (1914), 30 O.L.R. 350 at 365, 19 D.L.R. 512; *In re Harris Scarfe Limited*, [1935] S.A.S.R. 433; 4 Halsbury, 2nd ed. 1932, p. 128, note i.

L. H. Snider, K.C., for the Public Trustee: Our submission is that the judgment below is correct, but does not go far enough, and that it should be held that the trust is valid, without limitation to the relief of poverty. On the words of the will there is clearly a general charity in spite of the partial limitation to employees and past employees of the company and their dependants. The will limits those who are to benefit directly, but it does not limit the indirect benefits, which may extend far beyond the named class. There may be many indirect benefits, and in most cases the beneficiaries of a charity benefit only indirectly: cf. *In re Colchester Grammar School Scheme*, [1898] A.C. 477 at

483; *In re Hemsworth and Barnsley Grammar Schools* (1887), 12 App. Cas. 444; *In re A Debtor*, [1901] 2 K.B. 354; *Bostock & Co., Limited v. Nicholson & Sons, Limited*, [1904] 1 K.B. 725. Where there is a clear charitable intention and the particular object fails, one falls back on the general intent and establishes some charity agreeable to the law in the place of the one that fails: *Moggridge v. Thackwell* (1802), 7 Ves. 36, 32 E.R. 15; *De Costa v. De Paz* (1754), 2 Swan. 532n, 36 E.R. 715; *Cary v. Abbot* (1802), 7 Ves. 490, 32 E.R. 198.

The test as to whether a gift is charitable or not, so far as public benefit is concerned, is not that of relationship to named individuals or corporations, but that of the extensiveness of the charity, and whether it affects or benefits a sufficiently large class. In any event, the Court should not lay down a hard-and-fast rule, but should decide each case on its merits: *Hall v. The Urban Sanitary Authority of the Borough of Derby* (1885), 16 Q.B.D. 163 at 170-2; *Shaw et al. v. Mayor, etc., of Halifax*, [1915] 2 K.B. 170 at 183. In the United States a charity for employees of a particular railway was held good in *Eagan et al. v. Commissioner of Internal Revenue* (1930), 43 F. 2d 881 at 883-4.

Beverley Matthews, K.C. (W. C. Terry, with him), for the administrators of the estate of H. C. Cox, submitted his rights to the Court.

Hon. S. A. Hayden, K.C., for the executors of L. B. Cox: *In re Hummeltenberg*; *Beatty v. London Spiritualistic Alliance, Limited*, [1923] 1 Ch. 237, was expressly approved in *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31, [1947] 2 All E.R. 217. There is nothing in any of the decisions to preclude the Court from considering each case on its merits: *Re Bennett*; *Gibson v. Attorney-General* (1920), 122 L.T. 578 at 581.

J. D. Arnup, K.C., in reply: Even if the testator had expressly said that this trust was to be applied for the relief of the poor, we would still say that it was not a valid charitable trust, and would ask this Court to follow the law as laid down in the English cases. We must first see the meaning of the words used: *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson et al.*, [1944] A.C. 341 at 367, [1944] 2 All E.R. 60. The Court must find not that the trustees *may* apply this fund

to an object that is charitable in law, but that they are *directed* so to apply it. The word "charity" has a precise legal meaning: 4 Halsbury, 2nd ed. 1932, p. 221, para. 167; the *Chichester* case, *supra*, at p. 368; *Blair v. Duncan et al.*, [1902] A.C. 37 at 43; *Houston et al. v. Burns et al.*, [1918] A.C. 337 at 343. It would be unduly stretching the terms of this trust to say that the testator intended it to be for the relief of poverty. For example, broad benefits of education may have been intended. A trust cannot be made charitable merely by using the word: Halsbury, *loc. cit.*, p. 166. We must construe the words as used and then apply the law.

As to the rule that the Courts seek to avoid an intestacy, it goes no further than a presumption that the testator did not intend to die intestate. If in the result he did in fact die intestate, the Courts will not hesitate: *Re Cox* (1927), 60 O.L.R. 426 at 428.

In *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31, [1947] 2 All E.R. 217, it is said that the element of public benefit will be presumed unless the contrary appears, and it does so appear where the class to be benefited is limited to employees of a named employer. The cases as to "poor relations" are an anomaly, and the principle should not be extended to employees on the strength of an unreported case. As to the alleged general charitable intention, I refer to Tudor on Charities, 5th ed. 1929, pp. 140-6. In many of the cases cited by Mr. Snider the Courts were considering exemptions from taxing statutes, and were not discussing charitable trusts from the standpoint of their validity.

Cur. adv. vult.

16th February 1951. The judgment of the Court was delivered by

ROACH J.A.:—National Trust Company Limited and Alfred Herbert Cox are the administrators with the will annexed and trustees of the estate of Herbert Coplin Cox, deceased, who died on or about 17th September 1947. They are also the executors and trustees of the estate of Louise Bogart Cox, widow of Herbert Coplin Cox, who died on or about 18th November 1948.

They move the Court for its directions and advice on certain questions arising in the administration of each estate. Included in the questions submitted to the Court were the following:

(a) Whether or not the bequest provided for in clause 16 of the will of Herbert Coplin Cox is a valid charitable bequest.

(b) Whether or not the bequest provided for in clause 3(F) of the will of Louise Bogart Cox is a valid charitable bequest.

The answers to other questions which were submitted would be contingent upon the Court's answer to each of the questions which I have enumerated. When the motions came on for argument before Wells J. it was agreed that argument on those other questions should be deferred pending the Court's decision on the validity of the charitable bequests, and that upon the Court having decided that question of validity, the matter should be remitted to the Weekly Court for such consideration of those other questions as the parties might desire.

The provision in each will which gives rise to these questions of validity is contained in the residuary clause and those provisions are identical. The two motions were therefore argued together.

Subject to prior directions, the trustees are directed to hold the balance of the residue of the estate upon trust as follows:

"To PAY the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependants of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the Board of Directors of the said The Canada Life Assurance Company, as they, the said Board of Directors, in their absolute discretion shall from time to time decide. The Trust Fund is to be known as 'The Cox Foundation' in memory of the family whose name has been so long associated with the said Company."

Wells J. held that the provision constituted a valid charitable bequest for the relief of poverty. From that decision these appeals have been taken, and they were argued together. The Official Guardian supported the appeals. The Public Trustee, having served notice under Rule 497, argued that the order of Wells J. should be varied by declaring that the bequest in each will is a valid charitable bequest and is not restricted to the

relief of poverty. The board of directors of The Canada Life Assurance Company and the employees of that company opposed the appeal.

It was said that the value of that portion of the Herbert Coplin Cox estate affected by the clause in question in his will is approximately \$500,000 and that of the portion of the widow's estate affected by the similar clause in her will approximately \$200,000.

If the trust in question in each estate is not a valid charitable trust, it is void as offending the rule against perpetuities and a partial intestacy will result.

The issue in each of these appeals is one of first impression in Canada. It is important, and, as will appear as I proceed with these reasons, it is difficult.

In the development of these reasons, I take as my starting point the famous statement of Lord Macnaghten in *The Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 at 583. That statement is as follows:

“‘Charity’ in its legal sense comprises four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.”

A proposition of law for which there is ample authority carries me the next step. That proposition is as follows, that a trust cannot be a valid charitable trust within any of the four divisions described by Lord Macnaghten unless it is for a public purpose, that is to say, unless it is for the benefit of the community or an appreciably important class of the community.

In *Verge v. Somerville et al.*, [1924] A.C. 496, Lord Wrenbury, in delivering the judgment of their Lordships of the Privy Council, said, at p. 499: “To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a

parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot."

In *Williams' Trustees v. Inland Revenue Commissioners*, [1947] A.C. 447, [1947] 1 All E.R. 513, Lord Simonds, with whom Viscount Simon and Lords Wright, Porter and Normand agreed, said at p. 457: "It is not expressly stated in the preamble to the statute [the statute of Elizabeth, 43 Eliz., c. 4], but it was established in the Court of Chancery, and, so far as I am aware, the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals; if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble."

He then set out the rule as stated by Lord Wrenbury in *Verge v. Somerville et al.*, *supra*, which I have quoted, and continued: "It is, I think, obvious that this rule, necessary as it is, must often be difficult of application and so the courts have found. Fortunately perhaps, though Lord Wrenbury put it first, the question does not arise at all, if the purpose of the gift whether for the benefit of a class of inhabitants or of a fluctuating body of private individuals is not itself charitable."

This necessity for public benefit is again discussed in *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31, [1947] 2 All E.R. 217. At p. 42, Lord Wright said: "Even societies coming within the first three heads of Lord Macnaghten's classification would not be entitled to rank as legal charities if it was seen that their objects were not for the public benefit. . . . The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be *prima facie* assumed unless the contrary appears."

At p. 53, Lord Porter quoted from Lord Macnaghten in the *Pemsel* case, *supra*, stating the four heads of charity, and then continued: "From this language it might well have been argued that trusts for any of the first three objects were charitable whether they were beneficial to the community or not, but that inclusion in the fourth class is only permissible if such benefit can be shown. I cannot, however, find that such a contention has

ever been put forward. It was expressly repudiated by both sides in the present case and rejected by Russell J. as he then was in *Hummeltenberg's* case [*In re Hummeltenberg; Beatty v. London Spiritualistic Alliance, Limited*, [1923] 1 Ch. 237 at 240]. One must take it therefore that in whichever of the four classes the matter may fall, it cannot be a charity unless it is beneficial to the community or to some sufficiently defined portion of it."

There is an exception to that rule of public benefit. Cases coming within that exception are what have come to be known as the "poor relations" cases. They are referred to by Lord Greene M.R. in *In re Compton; Powell v. Compton et al.*, [1945] Ch. 123 at 137 *et seq.*, [1945] 1 All E.R. 198. Cases coming within that exception are all derived from the decisions in *Isaac v. De Friez* (1754), 2 Amb. 595, 27 E.R. 387, and *The Attorney General v. Price* (1810), 17 Ves. 371, 34 E.R. 143. In the former, the gifts were as follows: 1st, a gift of two annuities to the poorest relations of the testator and of his wife; 2nd, a gift of income to one poor relation of the testator "for a portion in the way of marriage and putting him or her out in the world"; 3rd, a similar gift of income to one poor relation of his wife. In the latter, the gift was in favour of the testator's "poor kinsmen and kinswomen and their offspring and issue which shall dwell in the county of Brecon".

In the first of those cases, the gifts were held to be valid charitable gifts, but no reasons were given for the decision. In the second of those cases, the gifts were held to be valid charitable gifts, apparently on the authority of the decision in the earlier case.

Of those cases and others like them, Lord Greene in *In re Compton*, at p. 139 said this: "If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently on the ground that their purpose was a private family purpose, lacking the necessary public character, but it is in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations on the faith that they were charitable, and many testators have no doubt been guided by these decisions. The cases must at this date be regarded as good law, although they are, perhaps anomalous."

The question of whether an alleged charitable bequest was for the benefit of the public or an appreciably important section of the public, on the one hand, or for a group of private individuals, on the other, engaged the attention of the Court in *In re Drummond; Ashworth v. Drummond*, [1914] 2 Ch. 90. In that case certain shares were bequeathed to trustees upon trust to pay the income therefrom to the directors of a commercial company "for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of the said company in such manner as a majority of the directors should in their absolute discretion think fit" and the directors were given the power to "divide the same equally or unequally between such workpeople".

Eve J. in his reasons, commencing at p. 95, refers to two arguments which were presented to him: 1st, that although there was nothing expressed in the bequest as to the poverty of the recipient or as to his or her inability to take a holiday without the aid of the contribution thereby contemplated, it ought to be inferred that there was imposed on the directors a trust so to exercise their discretion as to make contributions only in those cases in which the employee would have been unable to take a holiday or to contribute to the holiday expense fund without the assistance of the contribution, and that the whole class, having regard to their wages, was a class properly described as poor people within the statute of Elizabeth; 2nd, that the gift was, in any event, a good charitable gift because it was for general public purposes.

Of the first argument Eve J., at p. 96, said this: "... there is nothing in this bequest, or in the terms in which the discretion is given to the directors, which imposes on them the obligation of inquiring into the ability of the participants to provide themselves with a holiday without the assistance, or limits their powers of contribution to cases where no holiday would be possible without such contribution. Nor can I judicially hold that a large body of workpeople working at what does indeed seem to be a very small wage can properly be regarded as being in such a condition of poverty as to be poor people within the statute."

Of the second argument he said: "This is not a trust for general public purposes; it is a trust for private individuals, a

fluctuating body of private individuals it is true, but still private individuals, and that being so it is outside the line of authorities cited, and not being for public purposes, it is not charitable, but is void as infringing the rule against perpetuities."

That same question of public benefit again arose in *In re Compton, supra*. The decision in that case laid down a rule for the determination of that question, which has since been approved by the House of Lords in a case to which I shall later refer. The facts in *In re Compton* were as follows (headnote): "A testatrix by her will provided: '. . . the money . . . is to be . . . invested . . . under a trust for ever . . . for the education of C. and P. and M. children but C. and P. children are to take the preference as scholarships for the time thought best by the trustees not over the age of twenty-six years. It is not to be used as a pension or income for anyone and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children to be servants of God serving the nation not as students for research of any kind.' " The C. and P. and M. children were defined as the lawful descendants of three named persons. The appeal was from a decision which held that the trust was a valid charitable bequest.

Lord Greene M.R., reading the judgment of the Court, at p. 129 quoted from Lord Wrenbury in *Verge v. Somerville et al.* the portion of the judgment which I earlier quoted, and continued: "The proposition is true of all charitable gifts and is not confined to the fourth class in Lord Macnaghten's well-known statement in *Pemsel's* case. It does not, of course, mean that every gift that tends to the public benefit is necessarily charitable. What it does mean is that no gift can be charitable in the legal sense unless it is of the necessary public character."

Lord Greene declined to attempt to define what is meant by a section of the public, but at p. 131 he described those who do not come within it thus: "I come to the conclusion, therefore, that on principle a gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot in principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal

element is present however long the chain and the claimant cannot avoid basing his claim upon it.”

In re Hobourn Aero Components Limited's Air Raid Distress Fund; Ryan v. Forrest, [1946] Ch. 194, [1946] 1 All E.R. 501, had to do with a war emergency fund which during the war years from 1940 to the end of 1944 had been created by collections made weekly from the employees of a company operating three factories, those collections at first having been made informally and later by agreed deductions from the employees' wages. The money was for some time expended on comforts or money payments for ex-employees serving abroad or at home. After September 1940 it was decided to use the collected funds also to relieve, and after January 1944 solely to relieve, cases of employees who had suffered damage and distress from air raids. Claims were entertained only from persons who had contributed to the fund, but no means test was imposed on any application. The fund having been closed, the question arose as to how the surplus moneys were to be dealt with. Cohen J. held that there was no public charitable purpose in regard to the fund, and his decision was affirmed on appeal. At p. 200, Lord Greene M.R. confirms what he said in *In re Compton*, that a trust for the benefit of employees of a business is a purely private and personal trust, and points out that in his opinion the principle there stated applies whether the fund was put up by the beneficiaries themselves or by outside persons.

In the recent case of *Oppenheim v. Tobacco Securities Trust Co. Ltd. et al.*, [1951] 1 All E.R. 31, the income of the trust premises was to be applied “in providing for or assisting in providing for the education of children of employees or former employees of B. A. Co. Ltd. . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit and also at the discretion from time to time of the acting trustees to apply all or any part of the corpus of the said trust for the like purposes”. The House of Lords (Lord MacDermott dissenting) held that the common employment of the beneficiaries did not constitute them a section of the community so as to give the trust the necessary public character to render it charitable and, there being for this purpose no distinction between the employees and their children, the

gift was void for perpetuity. The rule laid down in *In re Compton* was expressly approved and applied.

That was an educational trust and their Lordships left undecided the question whether that rule should be applied to trusts for the relief of poverty among a group of individuals who are defined by reference to a personal relationship to a designated *propositus* or several designated *propositi*.

The question which their Lordships left undecided is the issue now before this Court. That issue may be otherwise stated thus: Does the relief of poverty among a group of individuals so defined constitute a second exception to the rule of public benefit?

There are decisions in England which simply cannot be reconciled with the rule as laid down in *In re Compton* and which support the argument that in England there is such an exception.

The first is *Spiller v. Maude* (1881), 32 Ch. D. 158*n*. In that case funds were accumulated by subscriptions from actors and actresses who were members of a theatrical society, and by donations from non-members. The rules and regulations governing the disposition of the funds declared that they were solely for the benefit of the society and that no person could be admitted to membership except an actual performer on the stage. They provided for an allowance for the funeral expenses of any contributor dying in indigent circumstances for the relief of orphan children of contributors; for the supply of medical advice and medicines to sick contributors unable to pay; and for granting annuities to contributors on becoming incapacitated, either by age, accident or other infirmity, from exercising the duties of his or her profession and not possessing an independent income of more than £50 per annum. Jessel M.R. held that, under the rules of the society, poverty was clearly an ingredient in the qualifications of the members who were to receive the benefits of the society, and that the whole fund was dedicated to charitable purposes.

Referring to that decision, Lord Greene M.R. in *In re Hobourn Aero Components Limited's Air Raid Distress Fund*; *Ryan v. Forrest*, *supra*, said: "I must confess, speaking for myself, that this seems to me to be a very extreme decision, because the whole arrangement was of a personal nature. However, it was saved by the fact of poverty."

Then there is the case of *In re Gosling; Gosling v. Smith* (1900), 48 W.R. 300. In that case, the deceased by a codicil to his will gave a gift of certain annuities to form a fund to be called the "superannuation fund" for the purpose of pensioning off the old and worn-out clerks of the firm of Gosling and Sharpe of which the testator was a member. It was held that this constituted a good charitable bequest. Byrne J., at p. 301, said:

"I think moreover, having regard to the phrase 'pensioning off' and to the frame of the gift, that poor clerks of the firm and those unable to provide properly for themselves and their families are intended to be benefited . . . The fact that the section of the public is limited to persons born or residing in a particular parish, district, or county, or belonging to or connected with any special sect, denomination, guild, institution, firm, name, or family, does not of itself render that which would be otherwise charitable void for lack of a sufficient or satisfactory description or take it out of the category of charitable gifts."

Then there is the more recent decision in the Court of Appeal in *Gibson et al. v. South American Stores (Gath & Chaves) Ltd.*, [1950] Ch. 177, [1949] 2 All E.R. 985. In that case, a company established a fund which it vested in trustees for the benefit of all persons who in the opinion of its London board of directors "are or shall be necessitous and deserving and who for the time being are or have been in the company's employ . . . and the wives, widows, husbands, widowers, children, parents and other dependants of any person who for the time being is or would; if living have been himself or herself a member of the class of beneficiaries". The English Court of Appeal, per Evershed M.R., stated the question there before it thus: ". . . under the law as it has now been established, and in the light of several recent decisions, both in this court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm, or company, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?"

Having stated the question thus, he continued: "There is, I think, no doubt that the emphasis which has been placed in recent years on the need for that public characteristic had to some degree been lost sight of in earlier cases, and its emphatic affirmation (the last case I have in mind is *Gilmour v. Coats* [*infra*]

in the House of Lords) undoubtedly raises the question whether certain decisions of courts of first instance on trusts in favour of poor persons of various categories are now consistent with the principles which have been stated."

The Court then referred to the apparent conflict between the decisions in *In re Drummond*, *supra*; *In re Compton*, *supra*; and *In re Hobourn Aero Components Limited's Air Raid Distress Fund*, *supra*, on the one hand and in *Spiller v. Maude*, *supra*; *In re Gosling*, *supra*, and *In re Buck*, [1896] 2 Ch. 727 (a case similar to the other two), on the other. It was spared the task of doing more than pointing out that conflict because it felt itself concluded by its own decision in an unreported case of *In re Sir Robert Laidlaw's Trusts* (1935). Loyal following that decision, it held that the trust was a valid charitable trust.

At p. 195, Evershed M.R. said: "If in this or some other case the question of the charitable qualification of trusts in favour of employees of companies or businesses (which under modern conditions might include such classes as the whole of the coal miners, or the whole of the railway servants of England) arose, the House of Lords might well consider some new formulation of the proper principle applicable."

Earlier I said that their Lordships in the House of Lords in *Oppenheim v. Tobacco Securities Trust Co. Ltd., et al.*, *supra*, in approving the test as laid down by Lord Greene M.R. in *In re Compton*, *supra*, left undecided the question whether that test was properly applicable to those cases in which, though the beneficiaries constituted a group of private individuals as distinguished from the public, the attribute of poverty was a necessary qualification to participation in the benefits. Lord Morton of Henryton in his reasons, at p. 38, refers to the decision of the Court of Appeal in the *Gibson* case, a case which he says might possibly be described as a descendant of the "poor relations" cases. He points out that in that case and in *Spiller v. Maude*, *In re Gosling*, *In re Buck* and *In re Sir Robert Laidlaw's Trusts*, the element of poverty of the beneficiaries was present, and therefore that those cases came within the first of the four classes of charitable trusts laid down by Lord Macnaghten, whereas the case then before him came within the second class. Then he continued:

"I think that for this reason your Lordships are of opinion that it is neither necessary nor desirable to express any view, on the present occasion, on the cases to which I have just referred. I am content to fall in with this opinion, only observing that they may require careful consideration in this House on some future occasion."

Lord Simonds, in his reasons, points out that the element of poverty was not a necessary qualification of the beneficiaries and that their only qualification was that they be the children of persons in common employment. At p. 35, he refers to the so-called "poor relations" cases and says: "I do so only because they have once more been brought forward as an argument in favour of a more generous view of what may be charitable. It would not be right for me to affirm or to denounce or to justify these decisions. I am concerned only to say that the law of charity, so far as it relates to 'the relief of aged, impotent and poor people' (I quote from the Charitable Uses Act, 1601) and to poverty in general, has followed its own line, and that it is not useful to try to harmonise decisions on that branch of the law with the broad proposition on which the determination of this case must rest. It is not for me to say what fate might await those cases if in a poverty case this House had to consider them . . ."

The trusts with which we are here concerned are "for charitable purposes only". That phrase necessarily includes all legal charities. The law is now definitely settled by as high authority as the House of Lords—the *Oppenheim* case—that to the extent that those purposes include the charities coming within the second, third and fourth division of charities as classified by Lord Macnaghten these trusts are not valid charitable trusts because the beneficiaries are limited to a group of individuals who are defined by reference to *propositi* named by the donor in each case. Wells J. reached that conclusion but he held that they were valid charitable trusts limited to the relief of poverty among the beneficiaries. In my opinion they are not legal charitable trusts even for that purpose.

Clearly they do not come within the "poor relations" cases. Those cases constitute a class of anomalous decisions which are now regarded as good law only because of their respectable antiquity.

In the *Oppenheim* case Lord Morton of Henryton suggested that such a case as the *Gibson* case—the case at bar resembles it to the extent that the purpose of the trusts here in question include the relief of poverty—might be described as a descendant of the “poor relations” cases. In this Province at least, and I should think also in England, the “poor relations” cases as a class constitute a closed class and no other case not entirely identical with the “poor relations” cases should be legally adopted into that class.

Since that class is closed then the trusts here in question can be valid charitable trusts only if there is a second exception to the general rule, namely, trusts for the relief of poverty among a group of private individuals who are chosen by the donor by reason of another type of personal relationship, namely, their relationship as employees or dependants of employees of a named employer.

In my opinion this Court should hold that in this Province there is not such an exception to the general rule. The test as laid down in *In re Compton* and approved and applied in the *Oppenheim* case to an educational trust should also be the test to be applied in a trust for the relief of poverty. I can see no reason why it should be applied in the one but not in the other.

Counsel for the respondents, opposing these appeals, referred to the statement of Lord Simonds in *Gilmour v. Coats et al.*, [1949] A.C. 426 at 449, [1949] 1 All E.R. 848, in support of their argument that there might be one test applied to an educational trust and another to a trust for the relief of poverty. Lord Simonds said:

“But it is, I think, conspicuously true of the law of charity that it has been built up, not logically, but empirically. It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty. To argue by a method of syllogism or analogy from the

category of education to that of religion ignores the historical process of the law.”

That statement, as I understand it, does not support counsels’ argument. I understand Lord Simonds to be there pointing out that in the historical process of the law of charity there has been divergence in the treatment of allegedly charitable gifts in determining what might be called their potential quality for public benefit. In that historical process I know of no divergence from the principle that the beneficiaries of the gift must be the community or an appreciably important class of the community, except the divergence found in the “poor relations” cases. There has been, of course, the divergence found in those cases which I have earlier grouped commencing with *Spiller v. Maude* and ending with the *Gibson* case. The decisions in those cases are not binding on this Court and I prefer not to follow them.

I come back to *Verge v. Somerville et al.*, *supra*, and the statement of Lord Wrenbury that the first inquiry to make must be whether the gift is for the benefit of the public. In making that inquiry one does not look at the nature or quality of the gift, that is to say, whether it is for the relief of poverty, or for the advancement of education or for the advancement of religion. One looks only at the description of the beneficiaries.

My conclusion therefore is that these appeals should be allowed because these trusts are not trusts for general public purposes; they are trusts for private individuals, a fluctuating body of private individuals but still private individuals. Because they are not for public purposes they are not charitable and are therefore void as offending the rule against perpetuities.

I would allow the costs of all parties on each appeal to be paid out of the fund in question in each estate.

Appeals allowed.

Solicitor for the administrators of the H. C. Cox estate, and the executors of L. B. Cox, respondents: Frank McCarthy, Toronto.

Solicitors for Margaret Jane Ardagh, appellant: Graham, Graham & Bowyer, Brampton.

Solicitors for William Burt Shepard, appellant: McLaughlin, Macaulay, May and Soward, Toronto.

[COURT OF APPEAL.]

Tait v. The Township of McKellar.

Highways—Municipal Liability for Maintenance—Whether Municipality Required to Open Road Allowance—Bridge on Private Property—Deed to Municipality—Assumption of Road—Intention of Parties.

Although it is well established that dedication and acceptance of a highway are questions of fact, and that dedication is not to be too readily presumed, nevertheless the intention of the individual dedicating has always been held to be of prime importance, and where there is a conveyance in fee simple to a municipality of land proposed to be used for travel, and that land is given in exchange for an existing road allowance, it can scarcely be said subsequently that the lands conveyed were not intended to be used for a public road, particularly if it appears that they have in fact been used as a roadway, either public or private, for a period of many years before the conveyance.

AN APPEAL by the plaintiff from the judgment of King J., [1950] O.W.N. 832, dismissing the action.

5th February 1951. The appeal was heard by ROACH, HOPE and BOWLBY JJ.A.

F. D. Powell, for the plaintiff, appellant: The defendant is responsible for maintaining, as a public road, the road on the mainland, the long bridge, and part of the small island. The municipality forced the opening of the road in 1923, statute labour was later performed, and public money was spent, on it. In the tax deed of part of the island to the plaintiff, in 1926, the defendant acknowledged the road as an established township road. There is evidence of user by or on behalf of the public, and work has been done on it by the defendant. The conveyance to the defendant in 1949 was the final act of dedication and acceptance. This is sufficient to establish it as a public road in accordance with s. 453 of The Municipal Act, R.S.O. 1937, c. 266.

It is no argument to say, as the trial judge does, that the road could not be required as a public highway because it came to a dead end, since there is evidence that other roads in the township end at private property-lines.

When the property was conveyed to the defendant in 1949 it intended at first to take title only as far as the long bridge. It later requested that the long bridge, and part of the small island, be included in the deed, and that was done. It purchased the road as a unit. That is evidence of dedication and acceptance. The only purpose for acquiring the bridge and part of the small

island would be for a road. Even, therefore, apart from user and work, the bridge cannot be anything other than a public road, and the Township's responsibility.

Notice in writing of the plaintiff's claim was not required in the circumstances, and in any event the defendant had ample notice of the intended action: *Strang v. Township of Arran* (1913), 28 O.L.R. 106, 12 D.L.R. 41; *Schraeder v. The Township of Grattan*, [1945] O.R. 657, [1945] 4 D.L.R. 351.

The plaintiff's failure to maintain the short bridge on his own property did not in any way relieve the defendant from liability to maintain the long bridge: *Schraeder v. The Township of Grattan, supra*; *Sandlos v. Township of Brant* (1921), 49 O.L.R. 142, 58 D.L.R. 673.

When it is shown that a public road is not in a reasonable state of repair, and damages have been caused by the want of repair, a *prima facie* case is established against the defendant: *Cotie and McGee v. The County of Renfrew*, [1950] O.R. 369 at 373, [1950] 3 D.L.R. 487.

The plaintiff is entitled to recover damages for three months less one day before the institution of the action: The Municipal Act, s. 480(2); *Schraeder v. The Township of Grattan, supra*.

B. S. Marshall, K.C., for the defendant, respondent: The defendant took the property in 1949 as owner in fee simple; it did not assume it as a public road. Whether or not it afterwards devoted the portion leading in from the turning-around point to use as a public highway is a question of fact. [ROACH J.A.: Why did the municipality take title to the bridge and beyond? Is it drawing a long bow to say that what it bought was an existing roadway over private land, and that the conveyance was a dedication of the land as a public highway, and the municipality's taking of the conveyance was an acceptance?] That transaction might be impeached, being with an officer of the municipality. [ROACH J.A.: It has not been set aside.]

There has never been any work done on the bridge, except for the defendant's own convenience in getting gravel out on trucks. There has been no user by the public from the turning-around point to the small island since the deed was given. In *Schraeder v. The Township of Grattan, supra*, the Township had spent money on the road, paid the plaintiff for his work on it,

and arranged for a contractor. In this case no work was done, and no money was spent, after the deed was given.

The land was described in the deed as a road diversion, but that description was inaccurate. The diversion went only as far as the turning-around point.

[ROACH J.A.:—Is your position that the giving and acceptance of the deed constituted dedication, but that there could be no acceptance of the land as a highway until the municipality spent money on it or it was used by the public, and that it could not be used by the public because it was impassable?] That is my argument.

I refer to *Point Abino Association v. Township of Bertie*, 61 O.L.R. 120, [1927] 4 D.L.R. 503, affirmed 61 O.L.R. 610, [1928] 2 D.L.R. 31; *Fawcett et al. v. The Township of Euphrasia*, [1949] O.R. 610, [1949] 3 D.L.R. 588.

F. D. Powell, in reply.

Cur. adv. vult.

1st March 1951. The judgment of the Court was delivered by

HOPE J.A.:—This is an appeal by the plaintiff from a judgment of King J. dated the 27th October 1950, after a trial without a jury at the sittings of the High Court at Parry Sound on 22nd, 23rd and 26th October 1950, whereby the plaintiff's action was dismissed with costs.

The action was for damages alleged to have been sustained by the plaintiff because of the failure of the defendant to maintain in proper condition a road giving access to the plaintiff's property. The learned trial judge, in extensive reasons dismissing the plaintiff's action, found that the road established by the defendant stopped at a turning-point some distance short of the first or long bridge referred to in the pleadings, and that the established road did not include the long and short bridges as portions of it, and with respect to the non-repair of which the plaintiff claimed damages.

The plaintiff's property is an island known as "Island A", containing approximately 317 acres, in Lake Manitouwabing and a portion of a smaller island lying to the north-west of Island A. The remainder of this small island is owned by one Whitmell, who is also the owner of lot 16 in concession B of the township of McKellar. Both islands are part of lot A,

concession 8, in the township. Save for a small point of land on the mainland, which is also part of lot A, and the said two islands, the remainder of lot A is now drowned land, due to the raising of the water level of the lake by the construction of a dam by the Corporation of the Town of Parry Sound. Prior to this last event, some of the area between the mainland point and the small island and between the small island and Island A respectively formed a neck of marshy land. Across these two necks of marshy land, the plaintiff's predecessor in title constructed what was in the nature of a corduroy road or causeway which, in these proceedings and earlier, have been and are referred to as the "long bridge" and the "short bridge" respectively.

In the original survey of the township, a road allowance or road allowances were laid out leading from a main road known as "the north road" shown on ex. 6. The first of such road allowances ran at right angles to the north road in a south-easterly direction and formed the side road or boundary between lots 16 and 17 in concession B of the said township, which concession lies to the north-west of concession 8 referred to above. This road extended to the rear or north-westerly boundary of lot A, concession 8, which at the point of intersection was the then high-water mark of the waters of Lake Manitouwabing. The second of such road allowances, 66 feet in width, was laid out as the boundary between lot 16, concession B, and lot A, concession 8, and ran at right angles to the road allowance first mentioned and extended some 1393.9 feet south-westerly, again hitting the high-water mark on the shore line of the lake. This last-mentioned road allowance was, for approximately the first two-thirds of its length, marshy or drowned land. It then traversed the rear of that point of mainland forming part of lot A, concession 8, above mentioned.

By a by-law numbered 67 and filed in this action at the trial as ex. 10, passed on the 13th April 1903, the council of the defendant corporation "opened and established for public use as a road and Public Highway" the original road allowance between lots 16 and 17, concession B, that is to say, the first of the two road allowances before mentioned. No question with respect to this road arises in this action. By the same by-law there was opened "as a public road and public highway" a

deviation from the original road allowance between lots 16 and 17, concession B. This deviation is described in the by-law as being "upon and across certain portions of lot sixteen, Concession B", as shown on a sketch by Beatty, O.L.S., attached to and forming part of the by-law. Although the sketch so referred to was not produced in these proceedings, the by-law describes the deviation in these terms:

" . . . a strip of land forty feet wide the centre line of which commencing at a point in southerly limit of original road allowance between lot sixteen and lot seventeen, Concession B forty-six chains from the front of said lot sixteen; Thence South forty-three and one-quarter degrees West eleven chains and sixty links; thence South one and one-quarter degrees East two chains and thirty-five links more or less to the westerly limit of the road allowance at the eastern end of the said Concession B or eastern limit of said lot sixteen, containing eighty-four one-hundredths of an acre be the same more or less, the aforesaid bearings are magnetic."

It should be noted that the deviation according to the foregoing description terminates at the "westerly limit of the road allowance at the eastern end of said Concession B or eastern limit of said lot sixteen". Thus it is clear that it had the same terminal point as had that original road allowance which was 66 feet in width lying between lot 16, concession B, and lot A, concession 8. This terminal point would be on the water's edge of Lake Manitouwabing.

This By-law 67 contained the following recitals and enactments:

"AND also be it further enacted by the Municipal Council of the Township of McKellar that whereas John Thompson has petitioned this Council to close and convey to him the said John Thompson the original road allowance between Lot Sixteen, Concession B and Island A both in the Township of McKellar, in lieu of the aforesaid described road across said lot sixteen, Concession B;

"AND WHEREAS all proper notices having been given of the intention of this council to pass a by-law for closing and disposing of said original road allowance.

"AND WHEREAS this Council has determined and agreed to dispose of the said original road allowance and convey the same

to the said John Thompson in lieu of the aforesaid described road across said Lot Sixteen Concession B;

"BE IT ENACTED by the Municipal Council of the Township of McKellar that the original road allowance between lot sixteen Concession B and Island 'A' is hereby stopped and closed up

"AND BE IT FURTHER ENACTED that the Reeve of this Municipality be, and he is hereby authorized and instructed for and on behalf of this Municipality to execute, and attach the seal of this Corporation to a Deed of conveyance of the above original road allowance between Lot Sixteen Concession B and Island A to John Thompson and his assigns for and in consideration of the above described road across Lot Sixteen Concession B in the Township of McKellar."

Evidence at the trial disclosed that no conveyance of the road allowance so closed was made to Thompson in pursuance of the terms of the by-law just recited.

In 1907 the two bridges or causeways hereinbefore referred to were built by one Irwin, the plaintiff's predecessor in title, and the same were travelled to and from Island A to the point of the mainland which is part of lot A, concession 8, and thence across such point of mainland to the road allowance.

The plaintiff acquired title to his property in two different parcels and at different times. It is of some significance to note these conveyances and the descriptions of the rights of way mentioned therein. By a conveyance (ex. 4) dated 11th December 1916, from one Gould, the plaintiff acquired title to the westerly half of lot A in the eighth concession, containing 202 acres more or less, "and comprising all the portion of the said lot lying westerly of a line running parallel with the ordinary side lines of the Township and forming the westerly boundary of a parcel of land, a portion of said lot containing one hundred and sixteen (116) acres of land, formerly sold and conveyed by registered deed to Samuel and John Armstrong". This conveyance stated that the grant was subject to "any right of way or rights of way which may or do pertain to the owners and occupants of the easterly portion of said lot in respect of said land hereby conveyed". To relate the lands and right of way to the present, it should be noted

that the parcel thus acquired is that part of the plaintiff's lands lying nearest the mainland point of lot A, concession 8, and that the reservation of the right of way across that part of the lands so conveyed was a right of way which pertained to the easterly part of Island A, dealt with in the tax deed next to be mentioned.

In 1926, by a tax deed from the Township, the plaintiff acquired title to the remaining part of Island A as set out in the deed (ex. 5), together with what is described as a road allowance. A description of the lands and the road allowance so conveyed in ex. 5 is as follows:

" . . . the Eastern portion of said lot 'A' and divided from the Western portion thereof by a line which shall run parallel to the ordinary side lines of the said township and at a sufficient distance from the Eastern boundary of said Lot 'A' to leave 116 acres of said Lot 'A' on the Eastern side of the said lot:— the said portion of said Lot 'A' which is hereby conveyed being bounded on the North East and South sides by Manitowaba Lake and on the West side by the said line hereinbefore described. Also a road allowance across the Western portion of the said Lot 'A' described as follows,—Beginning at any convenient place on the line which divides the Eastern and Western portions of said Lot 'A' as aforesaid and running in a North Westerly direction across the said Western portion of said Lot 'A' till it joins with the township road which is established from the Northern road to the said Lot 'A' by the municipal council of McKellar Township. . . . "

The significance of the description of the terminal point of the so-called "road allowance" is that it describes the terminal as being "*the township road which is established from the Northern road to the said Lot 'A' by the municipal council of McKellar Township*", thus recognizing the establishment of the township road only to lot A, concession 8, that is to the original road allowance at the rear of the mainland point of lot A. If the "right of way" so described was to be taken as extending to the southerly end of the original road allowance as shown on ex. 6, there would be a strip of water intervening and thus it could hardly be said to "join" with the township road. Conversely, if the "road allowance" or right of way granted in the tax deed is only across the western

portion of lot A being so conveyed, to join with an established township road, then it must follow that the township road must have been considered as extending to the end of the right of way. This result could be so in two events: (1) that the right of way extended as a right of way across Whitmell's portion of the small island and his mainland point to the original road allowance between lot A, concession 8, and lot 16, concession B, or (2) that the township road had been extended by acceptance and performance of statute labour by the Township across the mainland point and the long bridge and that part of the small island owned by Whitmell to the boundary of the lands conveyed to the plaintiff.

If the matter had rested there, then the finding of the learned trial judge might find support, but with respect I am of the opinion that the trial judge has failed to attach proper importance to the actions of the defendant's council in the year 1948, as disclosed by By-law 324 passed on the 23rd October 1948 by the council (ex. 14) and also disclosed by the exchange of deeds between the defendant corporation and Whitmell pursuant to such by-law.

By-law 324 is entitled: "To provide for the sale of Original Road Allowance between Lot 16, Concession B and Lot A Concession 8 of the said Township of McKellar in the District of Parry Sound." The first recital therein is as follows:

"WHEREAS the Corporation of the Township of McKellar is the owner in fee simple of the lands and premises hereinafter described, in the Township of McKellar, and has obtained from Thomas Mark Whitmell of the Township of McKellar, an offer to purchase the said land in lieu of the present travelled road across Lot 16, Con. B. and part Lot A, Con. 8 Township of McKellar."

The enacting clause of this by-law reads in part as follows:

"1. That the said Original Road Allowance between Lot 16, Concession B and Lot A, Concession 8, of the said Township of McKellar, containing 2.1 acres, more or less, is no longer required for the purpose of the Corporation and the said offer to purchase the same, made by Thomas Mark Whitmell is hereby accepted."

The defendant must be assumed, in view of the authorization of a sale and conveyance of the original road allowance

between lot 16, concession B, and lot A, concession 8, of the township, to have been rectifying and completing its earlier dealings with respect to said road allowance as had been provided for in By-law 67 hereinbefore mentioned, but which had not apparently been completed by a conveyance to or from Thompson, who was Whitmell's predecessor in title to lot 16, concession B, and who was mentioned in the earlier by-law. A new factor had developed since By-law 67 in 1903, namely, the construction of the roadway from the mainland point of lot A to Island A via the two bridges or causeways. This extended roadway is recognized in By-law 324 and in the first recital thereof, in these words: "in lieu of the present travelled road across Lot 16 Con. B. and part Lot A Con. 8."

In 1923 wire fences were in existence at both the northerly and southerly ends of the roadway deviation referred to in By-law 67 and at that time, according to the evidence, the Township officials forced the removal of the fences and the opening of the deviated highway, thus indicating an intention to make use of it as a public road.

In the evidence of Mr. Whitmell, who was the township clerk, at p. 186, he states:

"The council of the Township of McKellar passed a motion to open this road which had been by-lawed for in 1903, but in '23 they passed a motion to open this road. There was a fence on the highway and another one where the diversion left the 40-foot township road, and they notified owners and persons who had the fences on to remove them."

This witness states that the fences were then removed and that the then township clerk, a Mr. John Fletcher, took the fences down. The same witness also states, at p. 186, that his father, who was his immediate predecessor in title, erected a fence running alongside the travelled road "to where we thought the original road allowance was between lot 16, concession B and lot A, concession 8", and further that Mr. Tait, the plaintiff herein, "had already erected his part [of the fence] from the bridge approximately to—that is what his intention was, from the bridge westerly to the original road allowance".

The conveyance from Whitmell to the defendant, dated the 6th January 1949, a copy of which was filed as ex. 9 at the trial, is clearly from a reading of it in furtherance and comple-

tion of the exchange of lands referred to in By-law 324. In his evidence at the trial Whitmell admitted having also received a conveyance of the original road allowance from the Township to himself. The conveyance from Whitmell to the Township states that the grant is made "in consideration of the Original Road Allowance between Lot 16 Concession B and Lot A Concession 8 in the Township of McKellar, in the District of Parry Sound, Province of Ontario, One Dollar of lawful money of Canada, now paid". The lands granted to the Township by this conveyance in fee simple are described as being composed of the following: "a road diversion through Lot 16 Concession 'B' and part Lot 'A' Concession '8' of the said Township, the centre line of which road diversion may be more particularly described as follows [there follows a description by metes and bounds].

"The road diversion being 40 feet in width 20 feet on either side of the above described centre line.

"Saving and excepting thereout and therefrom any part of the original 66 feet road allowance between Lot 16 Concession 'B' and Lot 'A' Concession '8', included therein."

In considering this by-law and the foregoing exchange of conveyances between the defendant and Whitmell, the trial judge failed to find evidence of intention to dedicate by Whitmell or to accept by the Township. That part of the reasons for judgment dealing with this point reads as follows:

"This exchange of lands between the defendant Township and its clerk, Whitmell, is further dealt with in By-law 324, which is a by-law of the Township of McKellar providing for the sale of the original road allowance referred to above to Whitmell, but which does not in any way provide that the Township shall assume the property deeded to it by Whitmell in ex. 9 as a public highway. Indeed Whitmell states that it was not his intention that it should be accepted by the defendant Township for use as a public road and the officials of the defendant Township who gave evidence, and I have no reason to doubt their evidence, all state that there was no suggestion in the deliberations of the defendant Township council that this property should be acquired as a public highway. The reason why it would not be required as a public highway is that it came to a dead end as far as the public was concerned and

would be useless to the public as a highway at the present time because of this."

With greatest respect to the opinion of the trial judge it would appear to me that at the time of the exchange the intention was clear and unequivocal and quite contrary to that found by the trial judge. Let me quote from the evidence which clearly supports the view opposite to that of the finding of the trial judge:

"Q. At whose request was that exchange made? A. Mine.

"Q. For what reason? A. I wanted this original road-allowance. I looked it up and found I was entitled to that in exchange for the road in place of the original road-allowance, and I was selling this property there and it was to advantage for me to have it for sale at this time for diversion to the water here.

"Q. In what general direction is that? A. Southwesterly, I would say. I asked for the title to the original road-allowance, and when the plan was drawn there was just the portion of the diversion across the original road-allowance was kept out, and the rest was transferred to me.

"Q. What did you give in exchange for that? A. When the first motion was made I offered to give them the right-of-way to the bridge. I couldn't stop them travelling at the time, anyway, because it was travelled for 27 years without interference, so I offered them the right-of-way from the straight stretch into the highway around to the bridge, and they agreed. . . .

"HIS LORDSHIP:—Q. That is, you conveyed the diversion? A. Yes. . . .

"MR. MARSHALL:—Q. As a result of something one of the members of the council said—being Mr. Tait's son—what was done? A. They changed the motion to read, 'to the line' instead of 'to the bridge'."

Although the witness Whitmell denied that there had been any dedication to public use of the land conveyed to the Township beyond the original road allowance, his state of mind and intention at the time of the transaction in 1948 and 1949 is best found in his evidence, at p. 174:

"A. Well, if I might be permitted, sir, the reason this land was given was because I was unaware of what my rights were,

and Mr. Tait asked that this motion be amended to read 'to the line', and I thought perhaps I had to do that to get the part that I wanted. I found out since all I should have given was to the rear of lot 16, this original road-allowance. According to the Act the Township was compelled to give me to that. That is the only reason the right-of-way was given past that, so I wanted this original road-allowance, which was my right in any case, without any further donations on my part."

That the council's intention, as well as that of Whitmell, was clear is to be found in the evidence of Whitmell with reference to the minutes of the council of which he was clerk, at p. 178:

"A. (Reads): 'By-law 324 be made to convey to Mark Whitmell the original road allowance between Lot 16 Concession 'B' and Lot 'A' Concession 8 in lieu of the present travelled road across Lot 16 Concession 'B' and across that part of Lot 'A' Concession 8 from Lot 16 Concession 'B' to bridge. By-law to be made after road is surveyed.'

"HIS LORDSHIP:—Q. What is the date? A. The date, sir, is October 23rd, 1948. Then they wrote at the bottom of this, 'Mark Whitmell to pay for the survey and deeds.'

"MR. POWELL:—Q. Have you any further reference to this transaction in your minute book? A. (Reads):—"Council met again on November 27, 1948. Moved and seconded that motion 10 of meeting held October 23rd, 1948, be amended to read 'to the line' instead of 'to the bridge'.

"Q. Is that the end of that particular motion? A. Yes.

"Q. Just to clear up the situation, what is meant by 'to the line instead of to the bridge'? A. The line, as I understand it, between my part of lot A and Mr. Tait's part, the easterly line of my portion. . . .

"Q. Then the situation is that you were requested by the Township to convey the then presently travelled road diversion to your southerly line in exchange for the original unopened road allowance? A. That is the request.

"Q. You did that? A. I did that, but I should not have."

This evidence of the witness Whitmell is supported by that of William Arnold Tait, a son of the plaintiff, who was also a member of the McKellar township council in the year 1948. His evidence on this point is to be found at p. 194 as follows:

"Q. Do you recall the motion which Mr. Whitmell read, dated November 27th, 1948? I will read it to you as close as I can. A. It may be better. I think I recall it, but it may be better.

"Q. As I remember it, it was moved by Mark Stanley and seconded by Arnold Tait that motion 10 of meeting held on October 23rd, 1948, be amended to read 'to the line' instead of 'to the bridge'? A. I remember that.

"Q. Do you remember the circumstances surrounding the passing of this motion? A. The council all agreed that it would be better the road continue on to the line instead of to the bridge.

"Q. Was that the reason it was passed? A. Yes, that was the reason."

Thus it would appear to be abundantly clear that Whitmell asked, and the defendant agreed, and both intended to close the original 66-foot road allowance which lay between lot 16, concession B and lot A, concession 8, and also intended to dedicate and accept as a travelled road in lieu thereof "the present travelled road", "to the line".

Reference to the plan (ex. 6) indicates that this original 66-foot road allowance at its southerly end ran to the water's edge of the lake, thus giving to the owner or owners of Island A a way of approach over a public road to gain access to the island via water. To accept in substitution for this original road allowance a deviation which, as held by the trial judge, would end at the so-called turning point, a distance of approximately 130 feet from the water's edge, would be to deny access by public road to the owner or owners of Island A. Thus there would be a violation of s. 496(1) of The Municipal Act, R.S.O. 1937, c. 266 (now R.S.O. 1950, c. 243, s. 470) which reads as follows:

"A by-law shall not be passed for stopping up, altering or diverting any highway or part of a highway if the effect of the by-law will be to deprive any person of the means of ingress and egress to and from his land or place of residence over such highway or part of it unless . . . another convenient road or way of access to his land or place of residence is provided."

By-law 324 (ex. 14) recites that the offer from Whitmell to purchase the original road allowance between lot 16, concession B, and lot A, concession 8, was "in lieu of the present travelled

road across Lot 16, Con. B and part Lot A Con. 8.” This clearly indicates that the travelled road, which was to be conveyed in substitution for the road allowance to be closed, did not terminate with the road allowance but extended across part of lot A, concession 8.

I fail to appreciate how there could be any clearer indication of the acceptance of the “present travelled road” as a public road, and the evidence quoted further indicates, as does the particular description in the deed to the Township dated 6th January 1949, that “the present travelled road” so accepted as a public road extended beyond the turning point as found by the trial judge, and to the limit or boundary between the lands of Whitmell and the plaintiff on the small island.

In the light of the foregoing, I consider that it is unnecessary to discuss the questions of user, statute labour, and expenditure of moneys, with respect to which considerable evidence was adduced at the trial. In my opinion, none of this evidence, in itself, goes to support the plaintiff’s claim.

A copy of a motion passed by the defendant’s council on 19th October 1946, and filed as ex. 7, reads as follows: “That this Council repair the short bridge on Island ‘A’ road.” Other evidence, however, does not indicate that any work pursuant to this particular resolution was in fact performed, but in any event there is, aside from this resolution, no evidence which would warrant a finding that the short bridge was assumed or established by the Township as a public highway.

The fact that the short bridge was the responsibility of the plaintiff and was in disrepair, as found by the trial judge, does not, in my opinion, relieve the Township from its liability with respect to the roadway including the long bridge to the boundary of the plaintiff’s land.

I fully appreciate that it is well-established law that dedication and acceptance are questions of fact; also that dedication must not be too readily presumed—a dedication must be made with intention to dedicate.

In the dedication of land for a public road, intention of the individual dedicating has always been held to be of prime importance, but where there is a conveyance in fee simple of the land proposed to be used for travel by the municipality, and the same is in lieu of a road allowance, can it be said

subsequently that there was no intention that the lands conveyed should be for a public road, *a fortiori* when the lands so conveyed have been used as a roadway, either public or private, for a period of 27 years before the conveyance?

While a question of fact is primarily one for the trial judge, yet I adopt in the present appeal the words of my brother Roach in *Hunsinger v. The Town of Simcoe*, [1946] O.R. 203, [1946] 2 D.L.R. 632, affirmed by the Supreme Court of Canada, [1948] 3 D.L.R. 224, in reversing the trial judge when he said (as summarized in [1946] O.W.N. 189):

“ . . . the trial judge had been clearly mistaken in saying that there was no evidence of either dedication or acceptance. He had not founded his judgment upon the weight or credibility of the evidence but upon a denial that there was any evidence. In such circumstances, the Court was free to review the record without the restraint of any expressed or implied findings as to credibility, and, if in disagreement with the trial judge, to deliver the judgment which in its opinion, should have been pronounced by him. *Fulton et al. v. Creelman*, [1931] S.C.R. 221, [1931] 1 D.L.R. 733, applied.”

I do not agree with the trial judge that the plaintiff is limited to such damage as accrued during the one month preceding the issue of the writ. Section 480(2) of The Municipal Act (s. 453(2) in R.S.O. 1950) limits the right of action to a period of three months from the time the damage was sustained. Notwithstanding, on the evidence, I would not disturb the quantum of damages as assessed by the trial judge.

The appeal, in my opinion, therefore should be allowed and judgment should be entered for the plaintiff in the sum of \$100 as damages suffered by the plaintiff as a result of the failure of the defendant corporation to maintain the roadway set out and described in the conveyance dated the 6th January 1949 from Whitmell to the corporation, filed as an exhibit herein, together with the costs of the trial and of this appeal.

Appeal allowed with costs throughout.

Solicitor for the plaintiff, appellant: Frank D. Powell, Parry Sound.

Solicitor for the defendant, respondent: Boulton S. Marshall, Orillia.

[MILLER Co. Ct. J.]

Carpenter et al. v. Smith.

Easements—Implied Grant—Sale of Lots in Summer Beach Colony—Description according to Plan—Rights over Beach, Shown on Plan—Recession of Lake Waters—Dedication—The Surveys Act, R.S.O. 1950, c. 381, s. 11(2).

In 1907 H. Co., as owner, registered Plan 300, being a subdivision of a tract of land on the east shore of Lake Huron. To the west of the lots on this plan there was shown a strip of land, 66 feet wide, marked "Shore Reserve", and beyond this was a further area, about 200 feet wide, marked "Sandy Beach" and bounded by another wavy line called "Water Line".

Held, the purchasers of lots on this plan (whose conveyances expressly referred to the plan) acquired by implied grant a right to use the area between the "Shore Reserve" and the water for all purposes for which a beach was ordinarily used at a summer colony. The fact that the waters of the lake had receded, so that this area had increased from about 200 feet to over 500 feet in width, and that high sand dunes had developed in it, did not affect these rights. Accordingly a subsequent grantee, through H. Co., of the area in question was not entitled to subdivide it, or to do any act to interfere with the rights of the plaintiffs as owners of lots on Plan 300.

On the evidence, the area in question was included in the plan, and H. Co. impliedly granted to purchasers of lots on Plan 300 such rights over the beach as were necessary for the reasonable enjoyment of their property, and it could not subsequently derogate from its grant. *Wells v. Mitchell et al.*, [1939] O.R. 372, applied; *Re Lorne Park* (1913), 30 O.L.R. 289; 33 O.L.R. 51, and other authorities, referred to. The accretion to the beach area could not transfer the plaintiffs' rights, but rather added to them, and although the dunes did not lend themselves to some of the activities usually enjoyed on a beach this fact did not destroy the plaintiffs' rights.

The evidence justified a finding that H. Co. had dedicated the area between the shore reserve and the water to the use of the public, and that the public had accepted it. *O'Neil v. Harper* (1913), 28 O.L.R. 635; *Watson v. Town of Kincardine* (1909), 13 O.W.R. 327, and other authorities, referred to. Once there had been such a dedication it could not be revoked. *The Town of Guelph v. The Canada Company* (1853), 4 Gr. 632, applied. *Semble*, the beach was a "commons" within the meaning of s. 11(2) of The Surveys Act. *Re Lorne Park*, *supra*, referred to.

The plaintiffs could not succeed on a claim to a right of way by necessity, since the shore reserve, subsequently made into a road by the municipality, afforded as much access to their lots as did that part of the beach. *McCulloch v. McCulloch* (1910), 2 O.W.N. 331; *Fitchett v. Mellow et al.* (1897), 29 O.R. 6, applied.

AN ACTION for a declaration and an injunction.

26th and 27th October and 13th and 14th November 1950. The action was tried by MILLER Co. Ct. J., presiding, at the written request of the Chief Justice of the High Court under s. 44(1) of The Judicature Act, R.S.O. 1937, c. 100, at a non-jury sittings at Walkerton.

F. G. MacKay, K.C., and *Maurice Downs*, for the plaintiff.
Campbell Grant, K.C., for the defendant.

5th March 1951. MILLER CO. CT. J.:—The plaintiffs, other than the seven first named, are the owners of property on Plan 300 at Sauble Beach, a summer resort on the east shore of Lake Huron. The defendant proposes to subdivide and sell part of the area that lies between their properties and the water. The plaintiffs claim that the area so proposed to be subdivided forms part of the beach; that they have the right to use it as summer cottagers ordinarily use a beach, and that the proposed subdivision will interfere with that right. In the statement of claim it was alleged that the seven first-named plaintiffs were the owners of land in another subdivision in the same resort district, Plan 378, and that the defendant proposed to subdivide and sell a similar area in front of their properties, over which they claimed rights. At the commencement of the trial the claim was abandoned as to the area in front of Plan 378 and the relevant portions of the statement of claim were struck out, but the said plaintiffs were left as parties to the action. It was not established in evidence that they own any property in the district.

On the 4th July 1907 there was registered by Hepworth Manufacturing Co. Ltd., the owner, with one immaterial exception, of the lands comprised therein, Plan 300, being a subdivision of the westerly end of parts of township lots 32 and 33, concession D, in the township of Amabel in the county of Bruce. By this plan the area comprised in it was divided into 106 lots and a number of streets, three of the latter running from north to south, and two of them from east to west. In addition, running parallel to the lake shore from south-east to north-west, and immediately adjoining the most westerly lots in the subdivision, there is laid out on the plan a strip, 66 feet wide, marked "Shore Reserve". Along the westerly limit of the shore reserve is a wavy line. About 200 feet westerly of this wavy line is another irregular line, marked on the plan "Water Line", and the area between the two lines is marked "Sandy Beach". The width of the beach is not indicated on the plan and it is slightly wider in some places than in others. The figure of 200 feet is my own rough estimate taken from the scale of the plan. According to the evidence of Maurice Hewitt, a land surveyor, this wavy line, as used by surveyors, usually indicates high-water mark. Counsel for the defendant objected to Mr. Hewitt's evidence in this respect, but on the authority of *Attrill v. Platt* (1883), 10 S.C.R.

425 at 468, I admit the evidence, and I accept that line as indicating the high-water mark. That conclusion appears to be supported by the fact that the line is immediately along the westerly limit of the shore reserve and that the area between it and the water line is all labelled "Sandy Beach". I would assume a "shore reserve" to be a reserve along the shore.

The Hepworth Manufacturing Co. Ltd. then proceeded to sell lots as shown on the subdivision plan and each of the plaintiffs, other than the seven first named, is now the owner of all or part of one or more of the said lots. The plaintiff William A. Monteith appears to be the only one who received his grant directly from the Hepworth Manufacturing Co. Ltd. In the case of the others there were one or more intermediate conveyances. The earliest of the grants from the Hepworth Manufacturing Co. Ltd. to any of the predecessors of the plaintiffs was made in 1907, and the last of them in 1911. The defendant said that he himself, he thought, had bought the last of the lots in the subdivision and he thought that it was in 1930. He was mistaken either as to the date or as to its being the last of the lots.

In front of this subdivision and for a distance of several miles along the shore the waters of Lake Huron are very shallow and attain depth very gradually. Over the years, due to the waters of the lake receding and the sand washing and blowing in, the area between the shore reserve and the water has greatly increased until it is now, at the northerly end of the subdivision, 518 feet wide, being slightly less as one proceeds south from that point. In part of this area sand dunes of varying heights have accumulated, the highest being variously estimated as 12 to 18 feet. At the northerly end of the subdivision they apparently commence about 92 feet west of the shore reserve and from there extend westerly about 126 feet. As one proceeds south from that point the dunes are closer to the shore reserve. The outer edge of the dunes, according to the evidence of Mr. Farncolme, an engineer called by the defendant, is now the high-water mark.

By grant dated 15th May 1931, but not registered until 12th May of the following year, the Hepworth Manufacturing Co. Ltd conveyed to its president, one James Douglas, personally, the area between the western limit of the shore reserve and the waters of the lake, and the same area was conveyed by Douglas

to his wife, Isabella Douglas, by grant dated 21st November 1932, and registered on the 24th of that month. Mrs. Douglas in turn conveyed the area to the defendant by grant dated 30th September 1938, and registered 24th October 1938, but reserved to herself a defined strip one chain wide running westerly from the west limit of "Lakeshore Road" 2 chains, 50 links. The reservation was said to have been of an area in front of her own lot on Plan 300. Each of these conveyances expressly excluded the lands in Plan 300 from the property conveyed. Counsel for the plaintiffs contends that Plan 300 extended to the water's edge and that the instruments, therefore, conveyed nothing. In my opinion it is clear from an examination of the whole description in each case that what was intended to be conveyed was the land between the shore reserve and the water.

The defendant has prepared and now proposes to register a plan of subdivision (ex. 21) of the area thus conveyed to him. The plan shows a single row of lots having as their easterly boundary the shore reserve as it appears on Plan 300 but called on his proposed plan "Lakeshore Road", and extending for the whole length of Plan 300 from north to south, the lots numbering consecutively from the north. The first 16 lots are 200 feet in depth from east to west, and the last 5 from 150 to 160 feet. Between lots 1 and 2 the plan shows a walk 10 feet wide, and between lots 7 and 8, and also between lots 14 and 15, a space 66 feet wide, which spaces are not marked but are said to be intended for streets. The first is about opposite Huron Street and the second about opposite Douglas Street on Plan 300. The proposed plan shows the area in front of, or to the west of, this tier of lots to what is thereon marked as "high water line" as "park reserve".

The area covered by the defendant's proposed subdivision takes in the area marked "Sandy Beach" on Plan 300 and extends beyond it to the west.

The contention of the defendant is that the area covered by his proposed plan is not beach, but sand dunes, and that the beach lies to the west of his plan.

At a time not definitely established, but certainly before 1933, and probably about 1929 or 1930, the Township of Amabel graded, and has since maintained, a road along the shore in front of Plan 300 and extending both to the north and to the south.

According to the evidence of Mr. Hewitt this road, known as Lakeshore Road, does not accurately follow the shore reserve but is not much off it, at least it "probably touches it in some places". Although no measurements are given, the extent to which the Lakeshore Road is off the shore reserve in front of Plan 300 appears on Mr. Hewitt's plan, which is ex. 2.

There is no doubt that the widening of the beach area and the growth of the dunes have been gradual. The evidence as to when the dunes first appeared to the west of what is now Lakeshore Road, that is to say, in the area which the defendant proposes to subdivide, is indefinite. I find on the evidence that there were no dunes of any significance, west of what is now Lakeshore Road in 1907 when Plan 300 was registered. I am helped to that conclusion by Plan 300 itself, which indicates the whole area from the west edge of the shore reserve to the water as being sandy beach, and which shows the west boundary of the shore reserve as being the high-water line. It appears from the evidence of Mr. Hewitt and the plan prepared by him, that the area above the high-water line as shown on Plan 300 takes in some land that had already accreted to the original township lots. In other words, the high-water line as shown on Plan 300 is not the high-water line as shown on the original township plan, and I think it is a reasonable inference that the surveyor, having shown the high-water line at a place other than it appeared on the original township plan, probably put it where the high-water line actually was. Moreover, the words "Shore Reserve" indicate a reserve along the shore, which I take it would be along the high-water line. The photograph, ex. 22, indicates that at the time it was taken the dunes were very low as compared with what they are now, as shown for instance by exhibits 24, 25 and 26. Exhibit 22, as nearly as the witness who produced it could say, was taken in 1930. It could not have been taken much earlier because it shows Lakeshore Road. If there has been as much change from 1930 to 1950 in the growth of the dunes as these pictures indicate, it is not hard to accept the evidence of those witnesses who say they were non-existent or negligible 10 or 20 years before that. The witness Aiken was familiar with the area before the first great war and he says that when he came back from the war the dunes were insignificant, but that the rate of recession of the lake waters accelerated very rapidly after 1920.

There is no doubt that from the earlier years after Plan 300 was registered the cottagers on that subdivision used the whole of the area west of the shore reserve for all the purposes for which a summer colony beach is ordinarily used. Not only the cottagers and their families, but, to some extent from the beginning and to a very great extent as time progressed, people from the farms and from towns for miles around used the whole of the beach area in connection with bathing in the lake, and sunbathing, for games of various kinds, bonfires, picnics, and all those things which people ordinarily do on a summer resort beach. As the waters receded and the dunes developed many of these activities were carried on closer to the water; some of them could no longer be carried on in the dunes. The dunes are, however, still used for picnics and sunbathing, particularly in windy weather, and the children continue to play in the sand of the dunes, as they always did.

There was evidence, which is borne out by the aerial photographs, ex. 5, that there are now three well-defined ways from the Lakeshore Road through the dunes to the level beach, two of them being opposite Douglas and Huron Streets, as shown on Plan 300, and that cars cannot drive generally in the dune area. There is however, nothing to prevent people walking through them, or over them, and there was evidence that some people still follow that course in going to bathe.

Immediately after the grading of Lakeshore Road by the Township a tennis-court was constructed in the area in question immediately west of Lakeshore Road and it was used by the cottagers generally and their families. The Sauble Beach Campers Association, an unincorporated body, spent money on its maintenance, the last expenditure being in 1941. Some time after that it fell into disuse. I think it has not been established that the association were ever asked to pay the Hepworth Manufacturing Co. Ltd. anything in respect of the use of the court, and certainly not that they ever paid anything.

A verified copy of the conveyance to each of the plaintiffs owning property on Plan 300 was produced in evidence. Only in the case of one plaintiff was the conveyance direct from the Hepworth Manufacturing Co. Ltd. and the conveyances making the chain of title to the others were not produced. In each of the conveyances in evidence the property is described by the number

of the lot according to Plan 300, and there is no mention of the beach or of any right of way or easement of any kind. As the abstract of title did not suggest otherwise I assume that the same is true of all the relevant conveyances making the title of the various plaintiffs. The problem therefore, differs from that in the case of *Wells v. Mitchell et al.*, [1939] O.R. 372, [1939] 3 D.L.R. 126, where there was an express grant of a right of way along the beach and the question was as to its extent and meaning.

It is clear, I think, that where the description in a conveyance refers to a plan, the plan becomes part of the description and may be considered in determining the extent and effect of the grant: *Nantais v. Pazner*, 59 O.L.R. 319, [1926] 4 D.L.R. 258.

Mr. Grant, however, argues that Plan 300 ends at the westerly limit of "Shore Reserve"; that the area marked "Sandy Beach" is not part of that plan but is marked solely as one of the means adopted to show the location of the lands included in the plan. Save as to the plaintiffs' claim that the beach, by its inclusion in the plan, has been dedicated to public use under The Surveys Act, now R.S.O. 1950, c. 381, I think that makes no difference. In all other aspects of the case the significant fact is that the plan shows the subdivision as fronting on, and adjacent to, a sandy beach. I shall, however, consider the argument.

Mr. Grant points out that the measurements of the areas on the plan are given but that there are no such measurements of the beach. The explanation appears to me to be that, the water-line being irregular, it would be difficult, if not impossible, to give measurements of the beach and that, in any event, the beach is the only area on the plan the measurements of which are unnecessary. The original township plan gives all other measurements, but none of the beach. Mr. Grant further argues that the "Shore Reserve" is for the public use; that if the beach were within the plan and were also for public use there would have been no purpose in separating the two areas, and that the fact that they are separated indicates either that the beach was not for public use or that it was outside the plan. I do not think that conclusion necessarily follows. The "Shore Reserve" is obviously a street or road; that is indicated by its width, 66 feet, and by the fact that it is the only means of access to a number of the lots on the plan. If it was the intention that the

beach should be used for the purposes for which a beach at a summer colony is ordinarily used, it does not follow that it was the intention to permit the street, "Shore Reserve", to be used in the same way.

Mr. Grant's next point is that part of the area marked "Sandy Beach" is below high-water mark (he does not concede that all of it is); that the part below high-water mark belonged to the Crown and could not have been included in the plan. That the land below high water is vested in the Crown is the law to-day by The Beds of Navigable Waters Act, now R.S.O. 1950, c. 34, but before the amendment of the forerunner of that statute by 1940, c. 28, s. 3, and at the time this plan was registered, the ownership of lands bordering the great lakes extended to low-water mark: *Carroll v. Empire Limestone Co.* (1919), 45 O.L.R. 121, 48 D.L.R. 14.

In my opinion the area marked "Sandy Beach" is included in the plan. It belonged to the Hepworth Manufacturing Co. Ltd., which put on the plan. It is called "Town Plot of Sauble Beach". If the beach was not included in the plan there was no need to indicate its nature; the shore-line was already marked by the wavy line used by surveyors for that purpose and by the shore reserve as marked on the plan. The original township plan does not indicate the nature of the area between high-water mark and the water, and one wonders why, if it was not part of the plan, its nature was indicated on Plan 300. And if it was part of the plan one still wonders why it was so indicated if it had no significance. In *Wells v. Mitchell et al.*, *supra*, Henderson J.A. evidently considered the beach as forming part of the plan.

The defendant has been familiar with Sauble Beach for sixty years and on his examination for discovery (questions 102-4) he said that he had always been familiar with Plan 300. For some years he was in the employ of Hepworth Manufacturing Co. Ltd. In his evidence at the trial he said that all the lots on the plan were sold for summer cottages and that without the beach they would be valueless.

On the evidence I think the Hepworth Manufacturing Co. Ltd. impliedly granted to those plaintiffs, or to the predecessors in title of those plaintiffs, who own lots on Plan 300, such rights over the beach as are necessary for the reasonable enjoyment of their property.

The general rule of law applicable is set out in 11 Halsbury, 2nd ed. 1933, p. 287, para. 524, as follows: "Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent accommodations afforded by the part retained to the part granted which (1) are of such a nature that they might form the subject-matter of an easement, (2) are necessary to the reasonable enjoyment of the property granted, and (3) have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. This rule is founded upon the principle that a man shall not derogate from his grant."

See also *Israel v. Leith* (1890), 20 O.R. 361 at 367.

It is most improbable that the Hepworth Manufacturing Co. Ltd., the original grantor, ever used the beach in connection with the subdivision lots. However, in *Gale on Easements*, 12th ed. 1950, p. 103, it is stated that: ". . . the rule that 'no man can derogate from his own grant' . . . seems . . . to be more obviously applicable to . . . cases . . . where there is no 'apparent sign of servitude', but, unless the easement be presumed, the grantor would in fact derogate from his own grant; *e.g.*, where a grant has been implied from the abutments given in a conveyance, or from the description of the grantee, or the purpose of the grant."

And at p. 289 of the above-mentioned volume of Halsbury, para. 526, it is said: "The rule against derogation from grant may also apply where there has been no previous enjoyment of the accommodation in question, if from the contract between the parties it must be assumed that the grantee has intended to use the land granted in a manner for which the accommodation would be reasonably necessary."

It appears from the last quotation that the intention as to the manner of using the land granted must appear "from the contract", but it is clear from the case of *Rudd v. Bowles*, [1912] 2 Ch. 60, cited as an authority for the statement in the text, that the surrounding circumstances may be considered. I think that the cases go further and that the intended use of the property, as contemplated by both parties, may be established by direct evidence; in effect, that such contemplated use is part of the surrounding circumstances.

A case in point is *Mellor v. Walmesley*, [1905] 2 Ch. 164. In that case the grant described the land as being situate on the seashore and bounded "on or towards the west by the seashore", and as being more particularly delineated on the plan on the back of the conveyance. According to the plan there was a small strip of land between the western boundary and the shore. By the time of the trial there had been a considerable accretion. The majority of the Court held that the defendant, successor to the grantor, was not estopped from claiming title to the strip and the accretion thereto, but all the members of the Court agreed that the defendant must be restrained from interfering with the plaintiff's access to the sea. Vaughan Williams L.J. referred at p. 175 to "the house, which the evidence shews it was contemplated by all parties would be built on the plot conveyed". Stirling L.J. at p. 180 said: "The conveyances were made in order that the grantees might erect seashore residences on the plots conveyed, to the enjoyment of which free access to the sea, so far as the grantor could give it, would in ordinary course be expected by the grantees." His conclusion was: "I think, therefore, that relief ought to be given on the basis . . . that the plaintiffs respectively are entitled to free and unrestricted access to the sea from every part of their frontages over every part of the strip of land now in question."

It might be suggested that the admission of evidence as to intended use of the property in *Mellor v. Walmesley* was because of the discrepancy between the description in the conveyance and the plan. There was nothing of that kind in the case of *Lyttelton Times Company, Limited v. Warners, Limited*, [1907] A.C. 476. The parties in that case had agreed that the defendant should erect a building adjoining the plaintiff's hotel and should rent a portion of the upper floors to the plaintiff for a stated term. The building was completed but the noise and vibration from the defendant's printing-presses on the ground floor of its building caused substantial inconvenience in the bedrooms installed by the plaintiff in the upper floors and this action followed. Lord Loreburn L.C. at p. 481 stated: "If A. lets a plot to B., he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired." And again on the same page: "When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose,

or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention."

There was no suggestion of any ambiguity or lack of clarity in the contract, but the Court gathered the intention of the parties from the negotiations leading up to the agreement and, it being in the contemplation of both parties that a printing establishment should occupy the ground floor of the building, it was found that the plaintiff's action must be dismissed. In *Gale, op cit.*, p. 405, it is said that in that case "a nuisance from noise and vibration was legalized on the ground of an implied grant arising from the common intention of the parties". And in *Halsbury* the right to create the noise and vibration, as found to exist in that case, is termed an easement.

In the case at bar the lots conveyed are described in the conveyance, by reference to the plan, as being in a subdivision situate on a sandy beach with the lake beyond—all the lots having access directly, or by streets, to a shore reserve along the beach. Otherwise than by the beach there is no access to the lake. All the lots were sold for summer cottages and without the beach they would be valueless. It follows, I think, that there was an implied grant of an easement over the beach. To use the words of *Henderson J.A.* in *Wells v. Mitchell et al., supra*, any other conclusion "is so entirely repugnant to the surrounding circumstances as to be out of the question".

I have referred to the rights of the plaintiffs as arising under an implied grant, but the rights passing to purchasers of property under such circumstances are variously described. In *Re Lorne Park* (1913), 30 O.L.R. 289 at 298, 18 D.L.R. 595, affirmed 33 O.L.R. 51, 22 D.L.R. 350, *Middleton J.* (as he then was) said:

"The cases cited mostly arise upon plans, but the principle is of wider application, and includes all cases in which the land is sold upon what may be called a 'building scheme', a scheme by which a part of the entire tract is set apart by the vendors for the benefit of the purchasers. When this is shewn, either by indications found upon a plan used in making the sales or otherwise, the vendors cannot depart from the plan or scheme which was the foundation of the sales. This may be regarded as an implied covenant, an implied grant of an easement, an equity

in the nature of an easement, or it may rest on the principles of estoppel. In any case, the property so dedicated or quasi-dedicated is rendered subject to the rights held out to the purchaser as an inducement to purchase. These rights may exist in perpetuity."

Once the grant of rights over the beach is established and it becomes only a question of the extent of the grant, the reasoning of *Wells v. Mitchell et al.*, *supra*, is directly in point, and I find that it was a grant of the right to use the area, called "Sandy Beach" on the plan, for all the purposes for which a beach is ordinarily used, and that the right extends from the "Shore Reserve" to the water's edge and from the northerly to the southerly limits of Plan 300.

Counsel for the defendant places much emphasis on the growth of the dunes and alleges that the beach is now west of the dunes and of the defendant's proposed subdivision, and that he has, by laying out streets in his subdivision, made ample provision for access by the cottagers to the present beach. It should first be noted that at least a small part of the defendant's proposed subdivision is not in the dunes, but I do not think the position is at all affected by the growth of the dunes or by the fact that there is now by accretion a more level beach close to the water. The accretion cannot transfer the plaintiffs' rights; it adds to them. It is true that the dunes do not lend themselves to some of the activities usually enjoyed on a beach, but others of those activities can be, and still are, enjoyed in the dune area. The children still play games there; the younger children play in the sand and their parents prefer to have them there where they can watch them; the cottagers still use the area for sunbathing, for picnics, and for camp-fires, and some of them pass through and over the dunes in going to the lake to bathe. Their rights do not depend on the extent to which they exercise them. It surely cannot be that because they can no longer enjoy some of the rights that were granted to them they have lost the right to enjoy any of them.

If the sandy beach, at the time of the registration of the plan, did not belong to Hepworth Manufacturing Co. Ltd., but formed part of the bed of the lake, the defendant is in no better position. In that event all subsequent accretions would be to the street, "Shore Reserve", and would take the character of the street

and be subject to the same rights as affected it: 4 Halsbury, 2nd ed. 1932, p. 560; *Wells v. Mitchell et al.*, *supra*. The street was a public street under The Surveys Act and the soil and freehold were vested in the Township of Amabel by The Municipal Act, now R.S.O. 1950, c. 243, s. 427(1).

If, as counsel for the defendant contends, part of the area marked "Sandy Beach" was in fact above high-water mark at the time the plan was registered and so was, in fact, not part of the beach, the defendant is estopped, by his predecessor's sale of lots from his plan, from saying so as against the plaintiffs who, or whose predecessors, bought lots: *Mellor v. Walmesley*, *supra*.

The plaintiffs who are owners of property on Plan 300 also claim a way of necessity over the beach on the ground that in earlier years there was no means of access to their properties save over the beach. We are, however, only concerned with the beach at the front of Plan 300 and the shore reserve gives as much access to the plaintiffs' land as does that part of the beach. When lands sold about on a road allowance the purchaser must, in the absence of some special agreement, look to it as the means of access to his property, and that is so even if the road allowance may be unfit for convenient use: *McCulloch v. McCulloch* (1910), 2 O.W.N. 331, 17 O.W.R. 639; *Fitchett v. Mellow et al.* (1897), 29 O.R. 6.

Even if a way of necessity ever existed it is now at an end as the plaintiffs have access to their properties by Lakeshore Road as established by the Township: *McCulloch v. McCulloch*, *supra*.

The plaintiffs also claim that the area in question was dedicated to the use of the public under what is now s. 11(2) of The Surveys Act, and at common law.

In support of their claim under The Surveys Act the plaintiffs allege that the "Sandy Beach" was a "commons" within the meaning of s. 11 of that statute. In *Re Lorne Park*, *supra*, consideration was given to the meaning of the word "commons". It was said to be an ambiguous term, which might be explained by circumstances, and it was held, in the circumstances of that case, to apply to parcels of land set aside for recreation purposes in a summer resort. Considered in connection with a summer beach colony, a sandy beach is probably a commons within the

meaning of the section. I am of the opinion, however, that for an area on a plan to be a commons within the meaning of the section it must appear from the plan itself that it is such a commons. Although the marking of the sandy beach on the plan was some evidence of Hepworth Manufacturing Co. Ltd.'s intention to sell the lots for summer cottages, taken by itself, it was not, I think, sufficient to commit the company to that scheme. If the company, before the sale by it of any lots for summer resort purposes, had decided to erect a saw-mill on the subdivision and to use the beach in connection with that saw-mill, there would, I think, have been nothing to prevent its doing so.

Before there can have been a dedication to the public use at common law there must have been an intention on the part of the owner to dedicate. The fact that the defendant Smith purchased the area in 1938, paid \$500 for it, and has since paid the taxes on it, would not indicate an intention on his part to dedicate it to the public use. Similarly, I think that James Douglas's acquisition of the property in 1931 indicates that he had decided that, with the accretion to the beach, there was then an area in the dunes of which he might make something for himself, rather than any intention to dedicate it to the public. His wife Isabella Douglas, to whom he conveyed it, would be in the same position. I think, however, that Hepworth Manufacturing Co. Ltd. was in a different position. At the time it registered the plan the area in question was the entire beach between the north and south limits of Plan 300, and there is no doubt on the evidence that throughout all the years that it owned the property the public used it for all the purposes of a summer beach. As the waters receded, the size of the beach increased, and the area in question grew up to dunes, and intensive use moved out towards the water, but the public continued to use the dunes area, to a more limited extent it is true, but as freely as they wanted. At no time did Hepworth Manufacturing Co. Ltd. interfere with them and at no time were there any obstructions or signs of any kind to indicate that they were not free to use it. I do not think that fishermen and occasional picknickers on the beach in the early days had any more significance than had the fact of those picknickers tying their horses in the trees on the subdivision lots. But although in the earlier years after the plan was registered the beach was, no doubt, not used as extensively as the more

level parts of the beach are used now, it was, I think, used in the same way, the extent of the use increasing through the years. With some hesitation I conclude that Hepworth Manufacturing Co. Ltd. did dedicate the area in question to the public use. There is no doubt that the public by its use accepted it: see *O'Neil v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649; *Watson v. Town of Kincardine* (1909), 13 O.W.R. 327; *Attorney-General v. Esher Linoleum Company, Limited*, [1901] 2 Ch. 647; and *Grand Surrey Canal Co. v. Hall* (1840), 9 L.J.C.P. 329, referred to in the last-mentioned case.

My hesitation is caused by the indefiniteness of the evidence as to when the use by the general public became extensive rather than occasional. In that connection I would refer to *Turner v. Walsh* (1881), 6 App. Cas. 636 at 646, quoted in *O'Neil v. Harper*, *supra*, at p. 643:

"It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses."

If the area was dedicated to the public use by Hepworth Manufacturing Co. Ltd. that dedication could not afterwards be revoked. "When a dedication has once taken place, whether made by a corporate body or an individual, the party dedicating has, as the very term imports, parted with all control over it inconsistent with the use to which he has appropriated it": *The Town of Guelph v. The Canada Company* (1853), 4 Gr. 632 at 652.

The plaintiffs who are owners of lots on Plan 300 also claim rights over the beach by prescription. None of the plaintiffs has shown that the area in question was used by his predecessors in title as distinguished from the summer cottagers generally. It has been established that three of the plaintiffs, Blackwood, Goudie and Jackson, themselves used the area for all the purposes for which a summer beach is ordinarily used for more than 20 years. They used it, however, in the thought that they were exercising a right of the general public rather than that they had

a right of easement attaching to their own lands. That such a use will not support a claim to a prescriptive right to an easement was decided in *Adams v. Fairweather* (1906), 13 O.L.R. 490 and *Baldwin v. O'Brien* (1917), 40 O.L.R. 24; see also *Warren v. Yeoll*, [1943] O.R. 762 at 776, [1944] 1 D.L.R. 118. It is true that the plaintiff Goudie thought that he had some particular right as the owner of a front lot in the subdivision, but it is not clear what he thought that particular right to be, whether it was the use of the whole of the beach at the front of Plan 300 or just the part of the beach in front of his own lot. I do not think the evidence is sufficiently definite to justify a finding that he had acquired a right by prescription or, if he had, what that right was.

In my opinion s. 14 of The Conveyancing and Law of Property Act, now R.S.O. 1950, c. 68, has no application save to conveyances subsequent to those from Hepworth Manufacturing Co. Ltd. That section can apply only to something that, in some form, had an existence at the time of the conveyance. Here there was nothing to which the section could apply until after the conveyance had operated and the severance of the dominant from the servient tenement had created an easement.

The seven first-named plaintiffs have established no interest otherwise than as members of the general public and they would suffer no damage from the defendant's proposed plan and subdivision otherwise than as members of the general public. They have, therefore, no standing to bring this action: *O'Neil v. Harper*, *supra*; *Whaley v. Kelsey*, 61 O.L.R. 679, [1928] 2 D.L.R. 268. As to them the action will be dismissed and they will pay to the defendant the additional costs, if any, which he has incurred by reason of their being made parties plaintiff.

As to the remaining plaintiffs there will be a declaration that they are entitled to use the area in question for all, or any, of the purposes for which a summer colony beach is ordinarily used, and an injunction restraining the defendant from registering his proposed plan or in any way dealing with the said lands so as to interfere with the rights of the plaintiffs. The costs of these plaintiffs will be paid by the defendant.

I should not leave this case without saying that the arguments of counsel have been most helpful.

Judgment accordingly.

Solicitor for the plaintiffs: Maurice Downs, Wiarton.

Solicitor for the defendant: Campbell Grant, Walkerton.

[GALE J.]

Ex parte Lunan.

Contempt of Court—Jurisdiction of Courts—Contempt Committed in Face of Court—Inferior Court of Record—Imposition of Term of Imprisonment to be Served at End of Existing Sentence—The Criminal Code, R.S.C. 1927, c. 36, ss. 1052, 1056.

A judge sitting in the County Court Judges' Criminal Court has inherent jurisdiction to punish for contempt committed in the face of the Court, and if he deals summarily with such contempt he is not limited by the provisions of s. 1052(2) of The Criminal Code, since the offence, when so punished, is to be regarded as indictable, if the provisions of the Code apply at all, which is doubtful. If the person punished is already undergoing a sentence of imprisonment in a penitentiary, the judge has power to sentence him to serve a further term in the penitentiary (even if that further term is less than one year), and to direct that the term so imposed shall not commence until the expiration of the existing sentence.

Habeas Corpus—When Remedy not Available—Committal by Court of Record—Contempt of Court.

A judge of the Supreme Court has no jurisdiction, in *habeas corpus* proceedings, to review a committal by a judge of the County Court Judges' Criminal Court (which is a Court of record) for contempt committed in the face of that Court. *Rex v. Martin* (1927), 60 O.L.R. 577, applied; *Reg. v. Gibson* (1898), 29 O.R. 660; *In re Helik* (1939), 47 Man. R. 179; *Rex v. Yong Jong* (1936), 50 B.C.R. 433, discussed.

AN APPLICATION for a writ of *habeas corpus*.

6th March 1951. The application was heard by GALE J. in chambers at Toronto.

G. A. Martin, K.C., for the applicant.

J. J. Robinette, K.C. and C. P. Hope, K.C., for the respondent.

6th March 1951. GALE J. (orally):—This is an application for the release of the above-mentioned David Gordon Lunan under *habeas corpus* proceedings, all parties having consented to the matter being argued as if a writ had been issued.

On the 12th November 1946 the said Lunan was convicted of an offence against The Official Secrets Act, 1939 (Can.), c. 49, and on the 20th November 1946 he was sentenced by His Honour Judge McDougall, sitting as judge of the County Court Judges' Criminal Court for the County of Carlton, to imprisonment in Kingston Penitentiary for the term of five years. Subsequently, in the spring of 1947, while serving the sentence above mentioned, Lunan was served with a *subpoena* to attend the trial of one Israel Halperin upon a charge under the same Act. When Lunan appeared before His Honour Judge McDougall, who was likewise trying Halperin, Lunan refused to

take the oath or make affirmation as a witness for the Crown, and the learned judge for that reason found him to be guilty of contempt of Court and sentenced him to serve a term "of one year in the Penitentiary at the City of Kingston, the said term to run consecutively to the term which he is now serving". The latter, of course, has reference to the sentence imposed upon Lunan on the 20th November 1946.

It appears from the material before me that the first sentence expired on the 20th January 1951, and these proceedings are now brought for the purpose of securing the release of Lunan upon the theory that the sentence imposed for contempt of Court was illegal and beyond the power of Judge McDougall. In my view the application must fail both because I have no right in these proceedings to review what was done by the judge of the County Court Judges' Criminal Court and also for the reason that what was done by him was within the scope of his authority.

I do not agree that the prisoner is entitled to release upon *habeas corpus* proceedings in a situation of this kind and in that regard I rely mainly upon the judgment of Mr. Justice Middleton in the case of *Rex v. Martin*, 60 O.L.R. 577, 48 C.C.C. 23, [1927] 3 D.L.R. 1134 (*sub nom. Ex parte Martin*), and on the cases therein referred to.

Contempt of court may properly be regarded in two aspects. In the first place all Courts of record possess an inherent and venerable jurisdiction to discipline at once and without formality any contempt committed in the face of the Court, and superior Courts have the right to deal with a contempt committed out of the presence of a Court. Those principles have been expressed many times over but specific reference may be made to *Carus Wilson's Case* (1845), 7 Q.B. 984, 115 E.R. 759. That the jurisdiction does not rest upon statutory authority is made clear by Chief Justice Rinfret in *Re Gerson; Re Nightingale*, [1946] S.C.R. 538 at 544, affirmed [1946] S.C.R. 547, 87 C.C.C. 143, 3 C.R. 111.

The common law also recognized contempt of court, at least in criminal proceedings, as a misdemeanour which could be punished by summary proceedings or by indictment.

In the *Martin* case Mr. Justice Middleton held that neither at common law nor under the then-existing statutes was

habeas corpus available to control the proceedings of a Court of record which had jurisdiction over the person and over the offence. I quote from Mr. Justice Middleton's judgment at p. 582. He says:

"Put shortly, my view is, that the accused cannot obtain the writ by virtue of the common law jurisdiction of the Court because he is in prison under a sentence of a court of criminal jurisdiction, and that he cannot obtain a writ under the enlarged jurisdiction conferred by the Ontario statute, because his imprisonment is under the sentence of a court of record."

While the matter before that learned judge did not involve contempt of court, his views would be even more decisive when applied to an attempt by *habeas corpus* to review punishment for contempt imposed by a Court of competent jurisdiction.

In this particular case it can scarcely be argued that Judge McDougall did not constitute a Court of competent jurisdiction in view of the provisions of s. 1 of The County Court Judges' Criminal Courts Act, R.S.O. 1937, c. 105, which is confirmed, if confirmation is needed, by s. 824 of The Criminal Code, R.S.C. 1927, c. 36. It is my conviction, therefore, that as Judge McDougall constituted a Court of competent jurisdiction with power over the person of Lunan and over the contempt which was practised upon him, proceedings cannot now be taken in this Court for the purpose of examining into his decision in the matter.

With his usual care and ability, Mr. Martin sought to distinguish Mr. Justice Middleton's views and, in the alternative, to show that they were ill-founded. In my opinion both of those attempts fail. I have read the judgment and I do not agree that Mr. Justice Middleton rested his decision upon the provisions of the Ontario Habeas Corpus Act as it was then worded, R.S.O. 1914, c. 84. It seems to me that after voicing the general principle which I have mentioned above he went on to show that, in the circumstances of the matter before him, the common law principles relating to *habeas corpus* were unaffected by the Act. I do not think that he erred in failing to resort to the earlier statute of 1866, as Mr. Martin suggests he should have done.

Mr. Martin also drew my attention to the decision of Chief Justice Armour in *Reg. v. Gibson* (1898), 29 O.R. 660, 2

C.C.C. 302. It is not directly in conflict with the views of Mr. Justice Middleton for in the *Gibson* case the application was brought under the proceedings of the existing Habeas Corpus Act, R.S.O. 1897, c. 83. To the extent that there is any clash I prefer the opinion of Mr. Justice Middleton, supported, as it seems to be, by other authorities. My preference is fortified by the fact that subsequently in the *Gibson* matter Mr. Justice Rose, in discharging the prisoner, refrained from expressing his judgment as to the statements made by the Chief Justice when he granted the writ of *habeas corpus*.

It is also said that Mr. Justice Middleton's judgment was not followed in *In re Helik*, 47 Man. R. 179, 72 C.C.C. 76, [1939] 2 W.W.R. 123, [1939] 3 D.L.R. 56, and in *Rex v. Yong Jong*, 50 B.C.R. 433, 66 C.C.C. 62, [1936] 2 W.W.R. 147, [1936] 3 D.L.R. 60. The *Helik* case involves so many different considerations that it is difficult to ascertain whether it does conflict with *Rex v. Martin*, *supra*. The *Yong Jong* case mainly decides that *habeas corpus* is available to obtain the release of a prisoner convicted by a Court having no jurisdiction to do so. It is of interest to observe that in the judgment no reference was made to the decisions in *Reg. v. Gibson* and *Rex v. Martin*. Presumably they were not in point.

For the foregoing reasons, therefore, I hold that these proceedings do not lie. However, I think I should repeat that I do not detect any defect in what His Honour Judge McDougall did. It is contended by Mr. Martin that the sentence was illegal because it exceeded that which is permitted by law. He argued that contempt of court is essentially a criminal offence punishable by indictment or summary procedure, or in this instance is to be regarded simply as a step in criminal proceedings and reference was made to two sections of the Code* specifically dealing with certain types of contempt. He then argued that as the conduct complained about was in the nature of a criminal offence and as there is no provision in the Code specifying the punishment which may be imposed for the particular offence the learned judge was obliged to

* Sections 165 and 180.

invoke the provisions of subs. 2 of s. 1052[†] since he had disposed of the matter not by indictment but summarily. Mr. Robinette's answer to that is sound. He contended that no matter how the judge upon whom the contempt is perpetrated deals with the offence, it is an offence which has the characteristics of an indictable offence and therefore the judge, exercising his inherent right to discipline contempt committed in his face, has power, even if the offence comes within those sections of the Code (which he does not concede, and I think he is right in refusing to make that concession), to impose whatever punishment he deems just. Even if it is an offence which is recognized by the Code it should be treated as if it were an indictable offence and thus within subs. 1 of s. 1052, regardless of how the judge proceeds. I am of the opinion that when the word "summarily" is used in subs. 2 it has reference to proceedings of a summary nature permitted by the Code as distinguished from proceedings taken by way of indictment and that the word "summarily" was never intended to apply to a situation where a judge, in the exercise of his common law right, deals at once with a contempt of Court without initiating other formal proceedings.

Mr. Martin then presented an alternative defect. He contended that if this was not punishment of a criminal offence, but rather was in the nature of the exercise of the disciplinary power possessed by Judge McDougall, the sentence was illegal because the prisoner was ordered to be detained in a penitentiary contrary to the provisions of s. 46 of The Penitentiary Act, 1939 (Can.), c. 6 and s. 1056 of The Criminal Code.^{††} It

[†]Section 1052 of The Criminal Code is as follows:

"Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

"2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both."

^{††}These sections provide as follows:

"1056. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed:

"Provided that . . . (b) when any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment

seems to me that in discharging his discretionary power to punish for contempt committed before him he is not governed by the provisions of The Criminal Code as to penalties and he might require the offender to be detained in a penitentiary for less than two years. The Penitentiary Act does not appear to be an express bar to such an order. In any event, however, that which Judge McDougall did is fully justified by proviso b of s. 1056 of the Code.

Mr. Robinette also invited me to apply the provisions of s. 1120 of The Criminal Code in the event that there was any error below. If I were of that opinion, I would wish to consider with greater care the ramifications of the last-mentioned section before resorting to it. I am inclined to agree with Mr. Martin that it is only to be used with some caution, particularly where, as here, the accused has already served part of the sentence about which complaint is made. However, in view of my judgment that not only do the proceedings not lie, but even if they did they could not succeed, it is quite unnecessary for me to consider carefully or otherwise the effect of s. 1120.

The application will be dismissed.

Application dismissed.

Solicitor for the applicant: G. A. Martin, Toronto.

in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary . . .”

“46. Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place.”

[COURT OF APPEAL.]

Rex v. Broughton.

Intoxicating Liquors—Penalties—Conflicting Statutory Provisions—Maximum Term of Imprisonment—Indeterminate Term in Reformatory—The Liquor Control Act, R.S.O. 1937, c. 294, ss. 87(1), 120(1)—The Reformatory Act, R.S.O. 1937, c. 382, ss. 7, 18(1).

Sections 7 and 18(1) of The Reformatory Act have not the effect of enabling a magistrate, before whom a person is convicted of an offence under The Liquor Control Act, to impose a definite and an indeterminate term which, when added together, amount in all to more than the maximum term of imprisonment prescribed by the latter statute for the offence. Section 18(1) of The Reformatory Act concerns the management of the reformatory and regulates the class of prisoners who, according to the term of imprisonment, may be admitted to a reformatory; it is not concerned with the powers of magistrates and judges to impose a term of imprisonment appropriate to the offence. Section 120(1) of The Liquor Control Act, on the other hand, deals specifically with the term of imprisonment that may be imposed for a violation of s. 87(1), and expressly limits that term.

If ss. 7 and 18(1) of The Reformatory Act were capable of such a construction, they would be in conflict with s. 120(1) of The Liquor Control Act, a later enactment, and impliedly repealed by it. *British Columbia Electric Railway Company, Limited v. Stewart et al.*, [1913] A.C. 816, applied.

AN APPEAL by the informant from the judgment of Legris Co. Ct. J., of the County Court of the County of Essex, on appeal from a conviction by a magistrate.

14th February 1951. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW, HOPE, HOGG and AYLESWORTH JJ.A.

W. B. Common, K.C., for the informant, appellant: My submission is that by the combined effect of ss. 7 and 18 of The Reformatory Act, R.S.O. 1937, c. 382, the magistrate here had power to impose a determinate sentence not exceeding six months, with an indeterminate period thereafter of not more than two years less one day, notwithstanding the express limitation in s. 120(1) of The Liquor Control Act, R.S.O. 1937, c. 294.

The following cases are to be considered: *Rex v. Oldaker*, 64 O.L.R. 564, 52 C.C.C. 318, [1930] 1 D.L.R. 648; *Rex v. Martin*, [1939] O.R. 128, 71 C.C.C. 360, [1939] 2 D.L.R. 449; *Re Baker*, [1948] O.W.N. 301, 91 C.C.C. 41, [1948] 2 D.L.R. 454; *Rex v. Tremblay*, [1948] O.R. 348, 91 C.C.C. 79, 5 C.R. 302, [1948] 3 D.L.R. 167. I submit that the combined effect of these decisions is that *Rex v. Oldaker* is still authority for the proposition that an indeterminate sentence may be added to a definite term of imprisonment imposed in any case under

The Criminal Code, R.S.C. 1927, c. 36, even if the total term thus imposed (including both the definite and the indeterminate) exceeds the maximum prescribed for the particular offence, unless the special limitation prescribed by ss. 778 and 779 is applicable. In a prosecution under a provincial statute, to which The Summary Convictions Act, R.S.O. 1937, c. 136, is applicable, there is no fettering of the magistrate's power corresponding to ss. 778 and 779 of The Criminal Code, and he is therefore free to impose sentence in accordance with the rule in *Rex v. Oldaker*.

C. L. Dubin, K.C. (appointed by the Court), for the accused, respondent: The magistrate's powers as to sentence must be found within The Liquor Control Act, and The Reformatory Act is inapplicable. Section 120(1) of The Liquor Control Act is the later enactment, having been first enacted as 1927, c. 70, s. 103(1), while ss. 7 and 18 of The Reformatory Act have been in their present form since 1913, c. 77, ss. 8 and 19.

The Liquor Control Act contains a complete code as to punishment, in ss. 115 to 121, and the punishment applicable to every offence is carefully set out. The Act is not framed in the same way as The Criminal Code.

The sentence in this case was imposed under s. 120(1) of The Liquor Control Act, and the language of that section shows that The Reformatory Act cannot apply. The section expressly prescribes a sentence of not less than two months or more than six months, and for a second offence a term of six months, neither more nor less. This is not the kind of language that is used in The Criminal Code. Moreover, many offences under The Liquor Control Act are punishable by determinate periods of thirty days or two months, and The Reformatory Act could clearly not apply to them. Where powers under a statute are described in the affirmative, the negative is implied: *Craies on Statute Law*, 4th ed. 1936, pp. 236-7; *Welch v. The King*, [1950] S.C.R. 412 at 422, 97 C.C.C. 177, 10 C.R. 97, [1950] 3 D.L.R. 641.

If the appellant's argument is right, it means that The Reformatory Act provides for an alternative penalty. In the absence of clear and precise language this cannot be the case, and the Act cannot be held to apply to a magistrate exercising powers given to him by The Liquor Control Act: *Craies*,

op cit., p. 453. The appellant, however, does not argue that The Reformatory Act should be read as an alternative, but says that the two Acts should be read together.

Section 242 of The Criminal Code, considered in *Rex v. Oldaker, supra*, was not worded like the sections of The Liquor Control Act. It was a general section, giving unrestricted power to a magistrate, whereas The Liquor Control Act expressly limits a magistrate's powers, giving him, in many instances, no discretion at all.

It is true that the Court in *Rex v. Martin, supra*, said that it was not overruling *Rex v. Oldaker, supra*, but the distinction is a very fine one: see editorial note to *Rex v. Martin* in 71 C.C.C. at 360. The language of the section considered in that case was strikingly similar to that of s. 120(1) of The Liquor Control Act, and Middleton J.A. held that it was an express restriction upon the power of the magistrate. I submit that the meaning of *Rex v. Martin* is that where there is a section directing a magistrate to impose a sentence within stated limits, he cannot go beyond those limits unless there is some other statutory provision expressly overriding the first.

The Reformatory Act was intended to provide a different form of punishment, one that might assist in reformation, and not a different quantum. The Act was also intended to relieve the congestion then existing in the gaols.

The appellant argues that one cannot look at The Reformatory Act alone, but that it must be considered with The Liquor Control Act, which prescribes the *minimum* sentence. The Liquor Control Act provides both a minimum and a maximum, and both must be considered.

The Liquor Control Act gives powers to a magistrate or two justices of the peace, whereas The Reformatory Act refers only to a "court". Magistrates and justices have never been thought to come within the word "court" unless expressly included therein by definition. The Liquor Control Act expressly makes applicable The Summary Convictions Act. That Act contains no definition of the word "court", but by s. 3(1) the provisions of Part XV of The Criminal Code are made applicable. It is clear from the context that the word "court" in Part XV invariably refers to the County Court, and there is a

clear distinction between a magistrate or justices on the one hand and a Court on the other.

Before The Reformatory Act can apply in the case of a male there must be a conviction for an offence punishable with imprisonment in the common gaol. The corresponding section, s. 8, of The Andrew Mercer Reformatory Act, R.S.O. 1937, c. 383, contains no such limitation. There is no offence that is made punishable by The Liquor Control Act with imprisonment in the common gaol. Some meaning must be given to these words, included in the one statute and omitted from the other.

W. B. Common, K.C., in reply: One must treat the word "court" in s. 7 of The Reformatory Act as referring to any trial tribunal. Any sentence of less than two years is served in the common gaol, unless a reformatory sentence is imposed.

Cur. adv. vult.

13th March 1951. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the informant, pursuant to the certificate of the Attorney-General, from the order of Judge Legris, of the County Court of the County of Essex, allowing an appeal from Magistrate A. W. McMillan in respect of a sentence imposed upon the respondent. The respondent was convicted on the 24th August 1950 of unlawfully keeping liquor for sale, contrary to s. 87(1) of The Liquor Control Act, R.S.O. 1937, c. 294. The magistrate imposed a sentence of imprisonment of four months determinate and three months indeterminate upon the respondent.

Section 120(1) of The Liquor Control Act provides as follows: "Every person who violates any of the provisions of subsection 1 of section 87 of this Act shall for a first offence be imprisoned for not less than two months or more than six months, and for a second or subsequent offence be imprisoned for six months."

The respondent appealed from the sentence imposed upon him as exceeding the limit of six months fixed by the statutory provision I have quoted. The learned County Judge allowed the respondent's appeal and reduced the term of imprisonment to four months determinate and two months indeterminate.

It is from this order of the County Judge that the appeal is taken.

Counsel for the appellant relied upon ss. 7 and 18(1) of The Reformatory Act, R.S.O. 1937, c. 382. These sections are as follows:

"7. The court before which any male person is convicted under, or under the authority of any Act of this Legislature, of an offence punishable by imprisonment in the common gaol may sentence such person to imprisonment in the reformatory."

"18.—(1) Every person sentenced directly to the reformatory shall be sentenced to imprisonment therein for a period of not less than three months and for an indeterminate period thereafter of not more than two years less one day."

According to appellant's contention, not only does s. 18(1) forbid the sentencing of a prisoner directly to a reformatory for a definite period of less than three months, with an indeterminate period thereafter of not more than two years less one day, but it also authorizes the judge or magistrate imposing a reformatory sentence, to impose a sentence of not less than three months definite, with not more than two years less one day indeterminate, notwithstanding that the statute under which the conviction is made limits the term for which imprisonment may be imposed to not more than six months

The magistrate has so applied the statute in this case. He has disregarded the limitation imposed by The Liquor Control Act upon his power to sentence for the offence of which respondent was convicted, and has assumed authority under The Reformatory Act to impose a term of imprisonment that goes beyond that which The Liquor Control Act says he shall not exceed.

I do not think s. 7 and s. 18(1) of The Reformatory Act are capable of an interpretation that would warrant this, but, assuming for the moment that such authority may be extracted from them, the result would necessarily be that the conflicting statutory provisions could not stand together. The magistrate so regarded them and has ignored the provision of The Liquor Control Act and has given effect to his interpretation of The Reformatory Act.

The provision of s. 120(1) of The Liquor Control Act is, by several years, the later enactment. It was enacted in 1927

by 17 Geo. V, c. 70, s. 103(1). Sections 7 and 18(1) of The Reformatory Act were enacted in 1913 by 3-4 Geo. V, c. 77, ss. 8 and 19. The provision of The Liquor Control Act should, therefore, prevail over the provisions of The Reformatory Act, if they are in conflict: *British Columbia Electric Railway Company, Limited v. Stewart et al.*, [1913] A.C. 816, 14 D.L.R. 8, C.R. [1913] A.C. 337, 5 W.W.R. 25, 25 W.L.R. 227, 16 C.R.C. 54. There would be a repeal of the older statute by implication: 31 Halsbury, 2nd ed. 1938, p. 561. There is no overriding power in The Reformatory Act to make it prevail over the later statute, but rather, where inconsistent with the later Act, it should be deemed to be repealed.

Section 13 of The Interpretation Act, R.S.O. 1937, c. 1, says: "Every Act shall be construed as reserving to this Legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege or advantage thereby vested in or granted to any person or party, whenever the repeal, amendment, revocation, restriction, or modification is deemed by the Legislature to be required for the public good."

It is not within the competence of the Legislature to pass a statute binding itself never to pass a contradictory statute. That would be to fetter itself in matters in which it is supreme: Halsbury, *loc. cit.*, p. 563. If, therefore, there is that repugnancy between the two statutory provisions for which appellant contends, the result must be that the provision of the older statute will go, and the appeal would fail on that short ground.

That is not the true position, however. Section 18(1) of The Reformatory Act concerns the management of the reformatory and regulates the class of prisoners who, according to the term of imprisonment, may be admitted to a reformatory. It is not concerned with the power of judges and magistrates to impose a term of imprisonment appropriate to the offence of which a prisoner stands convicted. If the statute were to be so regarded, it would have the extraordinary result that the judge or magistrate would not be confined, in respect of the length of the definite term of imprisonment imposed, to any maximum term. All that s. 18(1) restricts him to in that respect is a minimum term of imprisonment for a period of

not less than three months. Such an unrestricted power of imposing sentence is contrary to the whole course of our penal legislation, except in respect of the most serious crimes. Commonly, the power is limited to the imposition of a sentence within limits deemed appropriate to the particular offence committed.

On the other hand, s. 120(1) of The Liquor Control Act deals specifically with the term of imprisonment that the County Judge or magistrate may impose for the violation of subs. 1 of s. 87, and expressly limits the term of imprisonment that may be imposed to not more than six months. The sentence imposed by the County Judge in this case, on appeal from the magistrate, is not at all in conflict with s. 18(1) of The Reformatory Act, and at the same time complies with s. 120(1) of The Liquor Control Act. It is only when there is read into s. 18(1) of The Reformatory Act something that it does not say, and it is regarded as conferring a substantive power, overriding all other, to impose any term of imprisonment that comes within the limits stated in the subsection, that any conflict with s. 120(1) of The Liquor Control Act can arise. The omission of any maximum time for the definite term of imprisonment is, in itself, enough to show that that was not the purpose of s. 18(1) of The Reformatory Act.

Much was said in the course of appellant's argument about s. 46 of The Prisons and Reformatories Act, R.S.C. 1927, c. 163. It is as follows:

"Every court in the province of Ontario, before which any person is convicted for an offence against the laws of Canada, punishable by imprisonment in the common gaol for the term of three months, or for any longer time, may sentence such person to imprisonment for a term of not less than three months and for an indeterminate period thereafter of not more than two years less one day in the Ontario Reformatory instead of the common gaol of the county or judicial district where the offence was committed or was tried."

The terms of this enactment are quite different from the terms in which s. 18(1) of the Ontario statute, The Reformatory Act, is expressed. Section 46 of the Dominion statute is directed expressly to conferring power upon the

Court to impose sentence as stated in the section. In *Rex v. Martin*, [1939] O.R. 128, 71 C.C.C. 360, [1939] 2 D.L.R. 449, this section of The Prisons and Reformatories Act was held to be in conflict with s. 778 of The Criminal Code, R.S.C. 1927, c. 36 which restricts the power of a magistrate to sentence a prisoner to imprisonment for a term not exceeding six months under the circumstances stated. It was held by the Court of Appeal that as power to sentence for a longer term than six months had been expressly denied the magistrate by s. 778 of The Criminal Code, s. 46 of The Prisons and Reformatories Act did not apply. The judgment in the *Martin* case was followed in the same year by an amendment of ss. 778 and 779 of The Criminal Code: see 3 Geo. VI, c. 30, ss. 20 and 21.

By its express terms s. 46 of The Prisons and Reformatories Act is confined to persons convicted of an offence against the laws of Canada, and it is not applicable to this case. Therefore, I do not think it necessary to deal with other cases cited upon the argument that are concerned with offences under The Criminal Code. The *Martin* case is useful here, for in that case, as well as in this present case as it is put by appellant, there are conflicting statutes, and in the *Martin* case that conflict was resolved in favour of the statute expressly imposing a limit upon the magistrate's power to sentence. The same result should follow here.

In my opinion the decision of the learned County Court Judge was right, and the appeal should be dismissed.

Appeal dismissed.

[COURT OF APPEAL.]

Rex v. Beck.

Criminal Law—Causing Fire by Negligence—Breach of By-law—Necessity for Finding that Fire Would not have Occurred Had By-law been Observed—Permitting Smoking not a Violation of By-law Prohibiting Smoking—The Criminal Code, R.S.C. 1927, c. 36, s. 515.

If the Crown, on a charge of causing a fire by negligence, relies on s. 515(2) of The Criminal Code, and establishes a breach by the accused of a municipal by-law intended to prevent fires, this alone will not support a conviction. There must also be a definite finding that the fire would not have occurred if the by-law had been complied with. Where, notwithstanding a by-law providing that "no person shall smoke" in premises of a named kind, an employer does nothing to prevent smoking by his employees in part of a building of that kind, he is not guilty of a breach of the by-law, so as to bring s. 515(2) into operation, if he neither counsels nor abets his employees' breach of the by-law, nor does or omits an act for the purpose of aiding them in breaking it. A by-law so worded does not impose an obligation on the person in charge of such a building to prevent (i.e., not permit) smoking by employees.

AN APPEAL from a conviction by Forsyth Co. Ct. J., in the County Court Judges' Criminal Court for the County of York.

12th and 13th December 1950. The appeal was heard by ROBERTSON C.J.O. and ROACH and AYLESWORTH J.J.A.

G. A. Martin, K.C., for the accused, appellant: This fire was obviously not "caused" by the accused, but by the independent and disobedient act of the employee Edwards. [AYLESWORTH J.A.: I suppose the only possible ground of liability would be that the accused was under an absolute duty, as a result of having taken some measures, to prevent smoking in the premises.] Yes. It is a fundamental principle of the criminal law that a man is punishable only for crimes that flow from his own acts, or the acts of persons he has counselled, procured, aided or abetted.

The mere permitting of smoking in part of the premises does not constitute a violation of the by-law by the accused. The by-law expressly uses the word "permit", but only in connection with the carrying of unprotected lights.

In any event, there is no proof that a general prohibition against smoking anywhere in the premises would have prevented this fire. This girl was deliberately violating the existing rule, which prohibited smoking in that part of the building, and might equally well have violated a total prohibition. Section 515(2) of The Criminal Code, R.S.C. 1927, c. 36, clearly contemplates a violation of some law that casts a duty on accused

himself, *e.g.*, a duty to provide fire-escapes. The only violation here of any "law" was by an employee.

The cases of vicarious liability are strictly limited, and deal with minor infractions of police regulations.

This by-law does not come within the words "any law" in s. 515(2). Those words must be limited to a "law" of the Parliament of Canada, or one made under its authority. In other subsections of s. 515 Parliament has used such words as "provincial or municipal law of the locality" (subss. 1 and 5) or "Dominion, provincial or municipal fire officer or authority" (subs. 4). It has been frequently held that the words "unlawful act" in the Code mean an act unlawful under a Dominion statute: *Rex v. D'Angelo*, 60 O.L.R. 512, 48 C.C.C. 127, [1927] 4 D.L.R. 593; *Rex v. Gosling* (1927), 47 C.C.C. 211; *Rex v. Costello*, [1932] O.R. 213, 58 C.C.C. 3, [1932] 2 D.L.R. 410; *Rex v. Pollard*, 13 Alta. L.R. 157, 29 C.C.C. 35 at 37, [1917] 3 W.W.R. 754, 39 D.L.R. 111; *Rex v. Suchacki*, 33 Man. R. 456, 41 C.C.C. 166 at 167, [1923] 3 W.W.R. 1202, [1924] 1 D.L.R. 971.

If s. 515(2) is wide enough to include a municipal by-law it is unconstitutional, because Parliament cannot delegate to any subordinate body power to legislate as to the content of The Criminal Code: *Attorney-General of Nova Scotia v. Attorney-General of Canada et al.*, [1950] 4 D.L.R. 369. Even if Parliament can incorporate by-laws, this section can only refer to by-laws in force when it was enacted, in 1919. The by-law here was passed in 1923, but not approved by the Municipal Board until 1942.

Even if none of these arguments is accepted, it cannot be said that any negligent act of the accused caused this fire, because of the intervening act of Mary Edwards: *Reg. v. Bennett* (1858), 28 L.J.M.C. 27, 8 Cox. C.C. 74. Further, it cannot possibly be found beyond reasonable doubt that this fire would not have occurred if all smoking had been prohibited on the premises.

The concern of the Court must be limited to the day on which the fire occurred, and on that day the accused was in England, and could not possibly have prevented this girl from smoking.

W. B. Common, K.C., for the Attorney-General, respondent: Section 515, including subs. 2, casts an absolute duty on persons owning, occupying or controlling premises in which a fire occurs, and if the fire results from disobedience of "any law" there is an absolute liability. The by-law applied to the whole building, and in any event it is plain that smoking was in fact permitted by the foreman on both sides. There is no doubt as to the intention of Parliament as to fixing liability, in view of the words of s. 515(2).

The circumstances show complete indifference on the accused's part to the danger from smoking. The management of the company in effect said: "Don't bother about the smoking by-law; we will permit smoking on the east side of the building." There could have been no fire if smoking had been prohibited and the prohibition had been enforced. The management was more concerned with keeping its employees and carrying on its operations than with making and enforcing safety regulations.

If s. 515(2) is to be interpreted as placing responsibility only on an individual who himself contravenes the by-law its whole operation will be stultified. I must read into the section some such words as "or permitted (condoned, authorized) a failure to obey".

"Any law" must embrace anything passed after the enactment of the subsection, because under s. 10 of The Interpretation Act, R.S.C. 1927, c. 1, the Code is deemed to be always speaking. The specific reference to "Dominion, provincial or municipal" in other parts of the section has the effect that where "any law" is mentioned in subs. 2 it must include all classes. Laws intended to prevent fires, etc., can only be passed by the Provinces or under their authority, since they clearly relate to property and civil rights, or matters of a local nature.

I concede that Parliament cannot delegate its powers to a Province, but there is no delegation in s. 515(2). It is merely provision for an offence where particular results follow a breach of a provincial or municipal law. Parliament does not seek to punish the accused for his breach of a by-law, but for the consequences of his failure to observe it.

Alternatively, the appellant may be guilty under s. 515(2) because of his failure to take the precautions required by s. 247. Permitting smoking in any part of this building, having regard to the hazardous nature of the business, and the dangerous materials used, was a failure to take reasonable precautions. One cannot fail to be impressed by the casualness of the accused and his foreman.

Section 515(2) must be read with s. 509, and s. 541 cannot furnish a defence in this case.

G. A. Martin, K.C., in reply: The evidence does not justify the statement that there was complete disregard of safety precautions in respect of smoking. Negligence at large, or on some other occasion, is in any case irrelevant, because this is a specific charge of causing this particular fire.

This legislation, if valid, can only be an incorporation of "laws" as they existed when s. 515(2) was enacted. It cannot be valid if it contemplates the incorporation of future "laws", because that would undoubtedly be a delegation of the power to alter the content of the criminal law of Canada.

The by-law definitely does not use the word "permit" in connection with smoking, although it does as to carrying lights.

Mere permission is not equivalent to counselling or procuring: Archbold, Criminal Pleading, Evidence and Practice, 32nd ed. 1949, p. 1473.

Section 515(2) contemplates (1) some law that imposes a duty on an owner or occupant as such; (2) a breach of that duty; and (3) a fire caused by that breach. Here the Crown has failed to establish any causal connection between the breach (if any) of the by-law and the fire. As to the necessity for this, I refer to *Rex v. Wilmot*, 64 O.L.R. 605, 52 C.C.C. 336, [1930] 1 D.L.R. 778.

Section 247 cannot assist the prosecution here. It merely defines a duty, and a causal connection is equally essential: *Reg. v. Bennett*, *supra*.

As to the necessity for proving that the accused's own act caused the death, I refer to *Hilton's Case* (1838), 2 Lew. C.C. 214, 168 E.R. 1132.

Cur. adv. vult.

14th March 1951. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the accused from his conviction in the County Court Judges' Criminal Court for the County of York on the charge that he "on or about the month of December in the year 1949, being the person owning, occupying or controlling the premises of the Pax Manufacturing Company situate and known as number 1121 Queen Street East in the said city, by negligence caused a fire in the said premises, which occasioned the loss of life of one Nancy Brackin, contrary to the Criminal Code."

The charge was laid under s. 515 of The Criminal Code, R.S.C. 1927, c. 36, the relevant portions of which are as follows:

"Every one is guilty of an indictable offence and liable to two years' imprisonment, who . . .

"(b) by negligence causes any fire which occasions loss of life or loss of property.

"2. The person owning, occupying or controlling the premises in which a fire occurs, which occasions loss of life or loss of property, or on which such fire originates, shall be deemed to have caused the fire through negligence, if such person has failed to obey the requirements of any law intended to prevent fires or which requires apparatus for the extinguishment of fires or to facilitate the escape of persons in the event of fire, if the jury finds that such fire, or the loss of life, or the whole or any substantial portion of the loss of property, would not have occurred if such law had been complied with."

The building known as no. 1121 Queen Street East was owned by the appellant. In that building, under the name of Pax Manufacturing Company, he was engaged in the business of manufacturing toys. The building was a one-storey building of cement block construction and had a concrete floor. It would appear that the building was originally constructed under a permit issued by the building department of the City of Toronto for manufacturing purposes. It would also appear that from time to time after the appellant first began his manufacturing business in the building inspectors had visited the premises during operations. It is not very clear, however, what department of government, provincial or municipal, the inspectors represented. In

any event it does appear that there was no criticism of the manner in which the appellant's business was being conducted with relation to those premises.

On the morning of 21st December 1949, shortly after the mid-morning ten-minute rest period commenced, a fire suddenly broke out in the building under circumstances to which I shall presently refer and in a matter of minutes the whole interior of the building was a raging inferno. At the time there were 19 employees in the building, 12 women and 7 men. They all escaped from the building, but one employee, Nancy Brackin, received burns so severe that she died therefrom.

The evidence leaves no doubt as to the source of the fire. It was touched off when one of the employees violated specific instructions issued to all the employees some considerable time earlier that no employee should smoke in the east half of the building. On the day in question, and for one or two days prior thereto, certain employees were engaged in the manufacture of a toy known as a "magic slate". Those operations were being conducted in the east part of the building. Incorporated in the the toy was a piece of celluloid, or nitro-cellulose. On the day prior to the outbreak of the fire those particular employees were specifically warned not to smoke in that part of the building because of the very inflammable nature of the celluloid with which they were working. One of the employees, in violation of those general instructions and the particular instructions, struck a match in order to light her cigarette. The flame came in contact with some celluloid which was on the floor near the work tables; that particular celluloid was immediately ignited and it in turn ignited other celluloid on the work table. It is a reasonable inference from the evidence that in the air not far from where the fire was started there was a quantity of fumes which had escaped from a painting-room in which toys were painted by a dipping process. These fumes were almost immediately ignited with a burst that resembled a small explosion.

The celluloid which was being incorporated into the toys was stored on shelves at the east side of the building. There were no partitions dividing the east part of the building from the west part, but the west part was occupied by machinery which was not in operation at the time of the fire and there was no inflammable material in the west half.

On the day of the fire the appellant was in England.

By-law 9868 of the City of Toronto, enacted on 10th December 1923 and approved by the Ontario Municipal Board on 25th February 1942, provides, *inter alia*, as follows:

Chapter 29, s. 2: "Subject to Article 1 of this Chapter [art. 1 deals with gunpowder], no dynamite, dualine, calcium carbide, nitro-cellulose or other explosive shall be kept or stored in or about any building in the City of Toronto unless permission so to do has been first obtained from the Committee on Property and City Council."

Section 5: "No person shall smoke, or have in his possession any lighted pipe, cigar or cigarette, or carry or permit any light, unless such light is enclosed in glass or other incombustible material, in any stable, carpenter shop or other building where there is hay, straw, shavings, lumber or other combustible material."

Chapter 36, s. 6: "No person shall establish, set up, carry on or continue a dry cleaning plant or business, a moving picture film exchange, a tannery, a fellmongery or a place for boiling soap, making or running candles or melting tallow, a coal oil refinery, or a manufactory of varnish, fireworks, or other material which from its nature will be dangerous in causing or promoting fires, unless a permit so to do has first been obtained from the Committee on Property and City Council."

The learned trial judge in convicting the accused specifically stated that in his opinion only s. 5 of c. 29 of the by-law was pertinent to the charge against the accused. He held that because the accused had permitted smoking in the building, he had not complied with that section, and that if he had the fire would not have occurred.

What had actually happened was this:

The appellant had obtained or had been supplied with a number of signs or placards on which was printed in large black type the following:

"Smoking prohibited in these premises

"P. Herd

"Fire Chief."

And, in smaller print, the following: "Pursuant to chapter 29, section 5 of by-law 9868 smoking is prohibited in this building. Violation of this prohibition is a misdemeanour punishable under

chapter A of by-law 9868, first offence, by a fine of not more than \$50.00."

Having obtained these placards he caused them to be posted up in numerous places throughout the building and they were in fact still posted on the day when the fire occurred.

Notwithstanding these placards and specific verbal instructions given from time to time by or on behalf of the appellant to employees, some employees persisted in smoking and were caught smoking behind the back of the appellant or his foreman. The appellant gave certain of these employees the alternative either to stop smoking in the premises or to quit their employment with him. Rather than stop smoking they quit. Thereafter the appellant's foreman, with his approval, unquestionably, called a meeting of the employees at which meeting the employees were told that if they persisted in smoking they could do so only in the rest period and over in the west half of the building.

In my opinion the learned trial judge was in error in holding that the appellant had failed to obey the requirements of s. 5, c. 29, of the by-law. It is to be noted that s. 5 is headed: "Smoking and Carrying Lights". That section deals with those two acts quite differently. It prohibits everyone from smoking in such a building. Then it prohibits the "permitting" of any lights being carried except those of a certain type. If the by-law had been intended to impose an obligation on the person in charge of such a building to prevent—that is, not permit—smoking therein, the language with respect to smoking would have been the same as or equivalent to the language with respect to permitting any light except those of a certain type.

Unquestionably the appellant was a person in authority over his employees, and could have insisted that they refrain from smoking in any part of the building, as, indeed, he earlier did. But he neither counselled them to break the by-law nor abetted them in breaking it. Neither could it be said that he did or omitted an act for the purpose of aiding them in breaking the by-law. When his employees persisted in breaking the by-law by smoking, all he did was attempt to confine them to that part of the building where there was apparently no danger. That did not amount to a breach of the by-law by him. If the appellant, having discovered his employees smoking indiscriminately about

the building, had simply done nothing about it, in my opinion he could not have been convicted of a breach of the by-law. Certainly he is in no worse position when, having so discovered them, he attempted to confine their smoking to that part of the building where there was no danger of fire.

The appellant had not obtained a permit under either s. 2 of c. 29 or s. 6 of c. 36 of the by-law. In this court counsel for the Crown argued that because the appellant had not complied with those two sections he should in the language of s. 515(2) of the Code "be deemed to have caused the fire through negligence".

The plain answer to that argument is that notwithstanding a breach of any law intended to prevent fires, as no doubt the sections of this by-law were, before the accused could be deemed to have caused the fire through negligence the trial judge would have had to find that the fire would not have occurred if such law had been complied with. Here the trial judge has not made such a finding. Indeed, he has stated that in his opinion those two sections were not pertinent to the charge.

For the foregoing reasons this appeal should be allowed and the conviction quashed.

Conviction quashed.

Solicitor for the accused, appellant: G. A. Martin, Toronto.

[McRUER C.J.H.C.]

Gareau v. Charron.

Negligence—Dangerous Premises—Duty of Invitor—"Unusual" or "unexpected" Danger—Reasonable Care by Invitee for Own Safety—Standard of Safety Required of Invitor.

The duty of an occupier of premises towards an invitee is to use reasonable care to make the premises as safe as normal premises of the same kind, subject to this, that if there is a danger that is unexpected, either from the character of the premises or from the ignorance or inexperience of the particular invitee, the occupier will be liable for that danger unless he gives warning to the invitee. Charlesworth on Liability for Dangerous Things, 1922, p. 237, approved.

Where the plaintiff, an experienced carpenter, being in a partially-constructed house of the defendant, stepped on a sheet of gyproc that had been laid over the top of an open stair-well, and fell, receiving injuries, *held*, in the circumstances, the defendant was not liable. The plaintiff knew that the place was one where great care was required for his own safety; he had been expressly warned of the frailty of the gyproc, and not to step between joists; he knew that the surface on which he stepped was gyproc, and that it would not support his weight unless supported by a joist; and he knew that the stair-well was covered with gyproc. The danger was as obvious to him as to the plaintiff; it was a danger neither unusual to him nor hidden so far as he was concerned, but, with his knowledge, was merely a danger to be avoided. The accident was therefore wholly due to the plaintiff's negligence.

AN ACTION for damages.

8th and 9th November 1950. The action was tried by McRUER C.J.H.C. without a jury at L'Orignal.

G. A. Addy, for the plaintiff.

M. E. Anka, for the defendant.

14th March 1951. McRUER C.J.H.C.:—This action is brought to recover damages for injuries sustained by the plaintiff through falling in the premises of the defendant. At the time of the accident the defendant's house, in which the accident took place, was in the course of construction. It was what is called a "semi-bungalow".

The lower floor was partially completed. It consisted of three bedrooms, a kitchen, hallway and parlour as shown on a rough sketch filed. The walls and ceiling were roughed in with a type of wallboard called "gyproc", which is applied in large sheets. The upper storey was unfinished. No floors were laid on the upper joists; the stair-well to the cellar was open and access to the cellar was gained by a ladder, while the upper stair-well was temporarily covered with a sheet of gyproc which was placed on top of the joists delineating the opening. This was done to pre-

vent heat from escaping to the upper storey during the completion of the lower storey and the ultimate construction of stairs leading to the upper storey. Immediately at the rear of the stair-well leading to the cellar was a floored area about 30 inches by 40 inches which, in due course, would form the floor of a passageway from the rear entrance to the kitchen and to the cellar stairs which would be placed in the lower stair-well under the stairs leading to the second storey. Above this area was a similar area in the ceiling which was left open for the purpose of gaining access by means of a ladder to the upper storey when necessary. This area was kept covered with removable rolls of insulation. The house had been wired for electricity and on the night in question there were three 200-watt bulbs on long extensions used for lighting purposes.

On the night of 8th November 1949 the plaintiff, who was a carpenter of ten years' experience, at the invitation of the defendant went to the house for the purpose of giving an estimate on the construction of kitchen cupboards. He returned the following evening and agreed to do the carpentry work for \$75, and the defendant agreed to supply the material. The defendant showed the plaintiff the lumber he was to use and the plaintiff then commenced the construction of the cupboards. He made some measurements and had a discussion with the defendant as to the height of the toe-recess under the cupboards. The defendant said he wanted it 4 inches high and the plaintiff said there was no lumber among the material that had been shown to him that would be suitable for this purpose. Thereupon the defendant told the plaintiff that there was an 8-inch plank in the upper storey which if ripped would meet their requirements. The defendant indicated to the plaintiff that the plank was lying on the joists in the northeast corner of the upper storey and showed him the means of access. He indicated that a step-ladder was to be placed on the small area which I have described to the rear of the cellar stair-well and that the plaintiff should go up the ladder, remove the insulation rolls and draw himself up on the joists forming the boundaries of this area. This the plaintiff did, and knelt on the joists until the defendant came up the ladder with a light on an extension cord, which he held so as to illuminate the upper area. At the time the plaintiff was setting up the ladder and removing the rolls of insulation a workman

was filling seams in the wall in the small hallway adjacent to the cellarway and had a 200-watt light hanging on the wall which, in my view, would give complete and clear illumination in the lower hallway.

The defendant warned the plaintiff to be careful to walk on the joists as he did not wish him to go through the ceiling below, but he did not give him any warning about being careful not to step on the sheet of gyproc covering the upper stair-well. The plaintiff succeeded in getting the plank loose from the joists to which it had been nailed and was proceeding to move it toward the 30 by 40 inch area through which he had come up, for the purpose of passing it through this areaway with the assistance of the defendant. The plaintiff says that in handling the plank he was being careful to walk on the joists and when he came to the sheet of gyproc covering the upper stair-well he assumed that the joist on which he was walking extended under the gyproc and he stepped forward on to it. The gyproc would not sustain his weight and he fell through, passing through the lower stair-well into the cellar, fracturing his left wrist.

For the purpose of applying the law to this case there must be certain definite findings of fact, and these I make. The premises on which the accident took place were in the course of construction. The plaintiff was an experienced carpenter and he was undertaking to work on the premises at night. He went up to the second storey at the invitation of the defendant and for a purpose in which they had a joint interest. He knew the second storey was not floored and notwithstanding that he says that he did not know that the upper stair-well was there or that it was covered with a sheet of gyproc, I must find on the evidence that it was impossible for a man of his knowledge and experience not to know this. The house was to his knowledge a storey-and-a-half bungalow. The ceilings downstairs were 8 feet high in the hall. The stair-well to the cellar was open. I think it would be quite impossible for the plaintiff, as he set up the step-ladder and looked up to the opening through which he was to go, to fail to see the larger opening, 11 feet by 40 inches, which was bounded by joists and separated from the opening through which he was to pull himself up only by a two-inch joist. I think the fact that this opening was there could not escape his view and that

the sheet of gyproc covering it would not sustain his weight was well known to him.

Some argument was addressed to me in support of the contention that the plaintiff was in the position of a servant of the defendant and undertook the risks incidental to his employment. I prefer to dispose of the case from the point of view most favourable to the plaintiff and to treat him as an invitee, not only on the premises but in the second storey. It must always be remembered that an action of this character is founded on negligence and "negligence consists of nothing more than a breach of the positive duty to take care imposed by law": per Lord Warrington of Clyffe in *Lochgelly Iron and Coal Company, Limited v. M'Mullan*, [1934] A.C. 1 at 14.

In the same case at p. 18 Lord Macmillan defined the elements of a case of negligence as follows: "Where two persons stand in such a relation to each other that the law imposes on one of these persons a duty to take precautions for the safety of the other person, then, if the person on whom that duty is imposed fails to take the proper precautions and the other person is in consequence injured, a clear case of negligence arises."

And at p. 25 Lord Wright said: "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing: on all this the liability depends"

In all negligence cases the duty owed varies according to the circumstances of the case and the character of the parties; *e.g.*, the same duty does not arise where adults are involved as in the same circumstances where an adult and a child may be involved.

"The duty which one person owes to another to take reasonable care not to cause him hurt by act or omission is relative both to the person injured and the person charged with neglect and the circumstances attending the injury. Among other such circumstances is that of place": *Latham v. R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398, per Hamilton L.J. at p. 410.

The distinction between a duty owed to children and a duty owed to adults was recognized in *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358 at 371.

In this case both the character of the premises and the special knowledge and skill of the plaintiff must be considered in determining what duty the defendant owed to him; that is, what duty an unskilled man owed to the plaintiff, an experienced carpenter, who was on the premises as a carpenter in the particular circumstances, having regard to the facts as I have found them.

The foundation of the law is contained in the classic statement of Willes J. in *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 at 288, affirmed (1867), L.R. 2 C.P. 311:

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

This passage has been much discussed by judges, text-book writers and essayists, but it is never to be forgotten that the statement was made in relation to a particular case and there are words in it which are not to be overlooked. I refer to "a visitor . . . using reasonable care on his part for his own safety" and "the occupier shall on his part use reasonable care to prevent damage from *unusual* danger, which he knows or ought to know".

The authorities are not clear as to the extent of the duty of the occupier of premises to his invitee. The learned author of *Salmond on Torts*, 10th ed. 1945, at p. 479, says:

"Is the duty of an occupier to an invitee a duty to use care to make the premises reasonably safe, or is it merely a duty to use care to ascertain the existence of dangers and either to remove them or give the invitee due warning of their existence? If the latter alternative is correct, the fact that the danger is actually known to the invitee is an absolute bar to any action by him. If, on the other hand, the duty of the occupier is the higher duty of taking care to make the premises reasonably safe, he commits a breach of this duty when he invites persons to enter premises which he knows or ought to know to be dangerous, even though those persons are themselves aware of the danger."

The learned author discusses the conflicting authorities and a repetition of that discussion would be of no value.

In *Brackley v. Midland Railway Company* (1916), 114 L.T. 1150 at 1155, Swinfen Eady L.J. followed and quoted from the judgment of Lord Atkinson in *Cavalier v. Pope*, [1906] A.C. 428 at 432, as follows:

"It is, I think, clear that the case does not come within the principle of *Indermaur v. Dames*, [*supra*] and the cases which followed it down to *Earl v. Lubbock*, [1905] 1 K.B. 253, because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risks he has no cause of action."

In *Griffiths et al. v. Smith et al.*, [1941] A.C. 170, Viscount Maugham said at p. 182 that occupiers were "under a common law duty to the invitee to take reasonable care to prevent injury to the latter from a hidden danger of which as occupiers they should have been aware, or to warn the invitee of the existence of the danger". The duty is referable to "hidden" danger, *i.e.*, danger hidden from the invitee. It is clear that a danger which may be open and obvious to one invitee may be hidden to another.

To the law which I have discussed may be added a comprehensive statement in Pollock on Torts, 14th ed. 1939, at p. 408: "[An invitee] is not entitled to find a state of positive safety, but only to warning of unusual danger incident to the nature and uses of the place. On the other hand the occupier is not entitled to create or maintain a state of things so dangerous as to make the place practically inaccessible or impassable, even if he gives warning; unless, indeed, the warning amounts to a warning off, when there would be no question of an invitee's rights; for notice that the place is not safe to enter upon at all would be in substance a withdrawal of the invitation."

"Unusual danger" is a danger unusual to the particular circumstances of the case and to the particular person injured.

In *Norman v. Great Western Railway Company*, [1915] 1 K.B. 584 at 595-6, Phillimore L.J., after referring to the statement of Willes J. in *Indermaur v. Dames*, *supra*, quoted from the judgment of Fry L.J. in *Simkin et al. v. London and North Western Railway Company* (1888), 21 Q.B.D. 453 as follows:

"the railway company were under an obligation to provide means of access to and egress from their station reasonably safe and suited for the carrying on of the business which their Act of Parliament authorized them to carry on. The question in this case is whether it was reasonably safe."

Phillimore L.J., said of this observation: "[It] again is to be read as applying to the case of the individual who was then seeking to recover; was it reasonably safe for him? We have not for this purpose to consider what is the duty to somebody else. I am not certain that a way to avoid misapprehension which might arise from the use of the words 'unusual danger'—which means, in my opinion, danger unusual for the particular person—might not be found by substituting the word 'unexpected' for 'unusual.' It is not a question whether the danger is unusual with regard to all the world, but whether it is unusual with regard to the individual complainant. In other words, in analysing the expression 'reasonably safe' one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises."

The learned author of *Charlesworth on Liability for Dangerous Things*, 1922, sums up the law applicable to the case with precise accuracy as far as I have been able to interpret the many and somewhat conflicting authorities, at p. 237:

"The duty of an occupier of premises towards an invitee is, therefore, to use reasonable care to make them as safe as normal premises of the same kind, with this proviso, that if there is a danger which is unexpected, either from the character of the premises or from the ignorance or inexperience of the particular invitee, then the occupier will be liable for it, unless he gives warning to the invitee. It may be a usual thing for warehouses to have unprotected holes in the floors for the purposes of business, but that will not exempt the occupier from the necessity of giving warning of their presence to an invitee who is ignorant of them. On the other hand, a person acquainted with the premises could not complain that, owing to the unprotected holes, reasonable care was not used to make the premises reasonably safe, because, to him, the danger would not be unusual. Many things on board a ship may be an unexpected danger to persons

not used to ships which would be quite harmless to a sailor, even though he had never been on that particular ship before."

It may be difficult at times to reconcile the law as here stated with the judgment in *Letang v. Ottawa Electric Railway Company*, [1926] A.C. 725, [1926] 3 D.L.R. 457, [1926] 3 W.W.R. 88, 32 C.R.C. 150, 41 Que. K.B. 312, with respect to the application of the doctrine of *volenti non fit injuria* as distinct from *scienti non fit injuria*. With respect to that case the conditions referred to in the last sentence of the passage I have quoted from Pollock existed and it was then necessary to consider the doctrine of *volenti non fit injuria*.

I am not confronted with such a difficulty in this case as I think the premises were "as safe as normal premises of the same kind", having regard to the use being made of them by the plaintiff, and there was no danger which was "unexpected, either from the character of the premises or from the ignorance or inexperience" of the plaintiff. The plaintiff, as I have said, was an experienced carpenter; he knew it was a place where great care for his own safety was required; he had been warned of the frailty of the gyproc and not to step between the joists; he knew the surface on which he stepped was gyproc; and he knew it would not support his weight unless supported by a joist. As I have found, he knew the stair-well was covered with gyproc. The danger of stepping on the gyproc was one that was open and as obvious to him as to the defendant. It was a danger neither unusual to him nor hidden as far as he was concerned. To a man with his knowledge in those circumstances it was merely a danger to be avoided.

I therefore find that the action fails on the ground that there was no failure on the part of the defendant to perform any duty which he owed to the plaintiff. The accident was solely due to the negligence of the plaintiff.

In view of this finding it is not necessary for me to discuss further the application of the maxim *volenti non fit injuria* or the subject of contributory negligence.

The action will be dismissed but under the unusual circumstances I make no order as to costs.

In case the action is heard by a higher Court I assess the damages at \$1,200.

Action dismissed without costs.

Solicitors for the plaintiff: Vincent & Addy, Ottawa.

Solicitor for the defendant: Michael E. Anka, Ottawa.

[BARLOW J.]

The Bank of Nova Scotia v. Canadian Road Equipment Limited and Large.

Deeds and Documents—Execution—Non est factum—When Defence will Fail—Signature of Bank Guarantee without Reading—Intention that Bank Should Act upon Document as Act of Signer.

R., the president of a company, called upon G., a bank manager, to request a further line of credit for the company. G. refused to extend further credit unless he was given a personal guarantee from the principal persons interested in the company. Some days later R. returned, with L., the vice-president and owner of one-half of the shares in the company. A guarantee was prepared in G.'s office, and was signed by both R. and L. L. later sold his shares to R. R. disappeared, the company became bankrupt, and the bank sued L. upon his guarantee. L. admitted that he had signed the guarantee, but pleaded *non est factum*, saying he had not read the document before signing it, and had not understood its effect.

Held, the defence must fail. G. properly assumed, when the guarantee was signed, that both R. and L. knew what they were signing, and there was no duty on him to tell either of them anything about the document. *Cooper v. National Provincial Bank, Limited*, [1946] K.B. 1, applied. L. knew that he was signing a document for the benefit of the company; the evidence did not suggest that G. was in any way a party to obtaining L.'s signature, and R. was not an agent of the bank. There was no misrepresentation about the guarantee. L. was clearly negligent in not reading the guarantee before signing it, and could not take advantage of his own negligence after the bank had acted on the guarantee. He was content to sign the guarantee with the intention that that which preceded his signature should be taken as his act and deed, whatever the document contained. *Canadian Bank of Commerce v. Dembeck* (1929), 24 Sask. L.R. 186 at 189, quoted and applied.

AN ACTION to recover the amount of an overdraft and a promissory note.

20th and 21st February 1951. The action was tried by BARLOW J. without a jury at Toronto.

J. G. Middleton, K.C., and *N. M. Rogers*, for the plaintiff.

G. W. Ford, K.C., for the defendant Large.

16th March 1951. BARLOW J.:—The plaintiff's claim is for an indebtedness of the defendant company, amounting to

\$16,128.37, represented by a bank overdraft and a promissory note. The claim against the defendant Large is on a joint and several unconditional and unlimited guarantee of past, present and future indebtedness of the defendant company to the plaintiff.

No appearance or defence was entered by the defendant company, and the plaintiff signed a default judgment on the 7th May 1949.

At the opening of the trial counsel for the defendant Large asked to discontinue a counterclaim, and the counterclaim was accordingly dismissed, with costs including the costs of the motion to discontinue. This left the claim against the defendant Large on the guarantee to be disposed of by the Court. The defendant company is in bankruptcy and nothing has been or is likely to be recovered on the plaintiff's judgment against the defendant company.

The defence of the defendant Large is the plea of *non est factum*. Large admits that he signed the guarantee, but says that his mind did not accompany the signing. The facts are important. The defendant Large had known one Roberts for four or five years. In July 1947 Roberts approached the defendant Large to go into business with him in the defendant company. As a result of their negotiations, the defendant Large purchased from Roberts a one-half interest in the defendant company for \$10,000.

On the 22nd July 1947 a shareholders' meeting and a directors' meeting of the defendant company were held at which meetings Large became a shareholder, a director and the vice-president of the defendant company. At the directors' meeting a banking resolution was passed, enabling the company to do business with the plaintiff. The defendant Large, as vice-president, became a signing officer for cheques and other documents of the defendant company pursuant to the resolution.

At the time of these meetings a balance sheet of the defendant company as of the 30th June 1947 was produced, and perused by Large. It is significant in that the balance sheet showed an indebtedness of the company to the plaintiff of \$3,325.56.

The banking resolution with the signatures for signing purposes, including the signature of Large, was deposited with the plaintiff.

Following the 22nd July 1947 the defendant Large became active in the company to the extent of giving some two days a week to its business. Large also, as vice-president of the company, signed some twelve cheques on the 25th July 1947, two cheques on the 28th July and one cheque on the 30th July. These cheques were signed pursuant to the above-mentioned banking resolution.

The guarantee upon which this action is brought was signed by Roberts, and Large, on the 26th August 1947. There is some conflict between the evidence of Gardner, the manager of the plaintiff bank, and the evidence of the defendant Large. After carefully observing the demeanour of these witnesses, I have no hesitation in accepting the evidence of Gardner. The latter says that Roberts, who was the president of the company, came in to see him a few days prior to the 26th August, and requested that the company be given further credit, to enable Roberts to go to the United States to purchase machinery for resale in Canada. Gardner refused a further line of credit without the personal guarantee of the principals in the company. At this time the company's overdraft at the plaintiff bank had increased from something over \$3,000 as of the 30th June to over \$8,000 on the 26th August 1947. Gardner says that on the 26th August 1947 Roberts and Large came into his office, and that Roberts said: "We have come to give you that guarantee." Gardner then had one of his staff prepare the usual bank guarantee document and, bringing it back into his office, handed it to Roberts, who signed it, and then passed it to Large, who also signed it. The guarantee was then handed to Gardner and without any discussion Roberts and Large left the office. Large says that he does not remember signing the guarantee, although he admits that it is his signature attached to it. Large further says that he does not remember being in Gardner's office with Roberts. He is vague about signing anything in the bank, but says that he did go into the bank to sign something; he says he thought it was a bank document for the right to sign cheques on behalf of the company. He says further that he had a discussion with Roberts as to signing cheques. I was not impressed with his evidence. Slightly over a month before the guarantee was signed, Large had signed the banking resolution and in accordance therewith had been signing company cheques. Large impressed me as

a man of good intelligence with a fair experience in business. He had been operating his own garage and service station for about ten years.

A few months after Large had purchased a half-interest in the company, he became suspicious of some of the cheques which he saw had been drawn upon the company's account, and finally it was agreed between Large and Roberts that Roberts would repurchase Large's interest in the company, and in February 1948 an agreement was drawn up and executed by Roberts and Large in which Roberts agreed to purchase the interest of Large in the company and paid him \$2,000 on account thereof, and agreed to pay the balance pursuant to the agreement.

In August 1948 Roberts disappeared. This came to the notice of the plaintiff bank and the manager telephoned Large to advise him of the fact. Large stated that he was no longer interested in the company, whereupon Gardner told Large that he was still a guarantor of the company's indebtedness to the plaintiff bank, and that the latter would expect him to implement the guarantee. Large then proceeded to the office of the bank and read over the guarantee. In his evidence Large told the Court that immediately he read the document he saw that it was an unconditional and unlimited guarantee. Large had not read the document at the time of signing it, although he had every opportunity of doing so, and it is clear that if he had done so he would have recognized it as being an unlimited and unconditional guarantee.

Gardner, the plaintiff's manager, quite properly from what took place at the time the guarantee was signed, presumed that both Roberts and Large knew what they were signing. The law is well settled that there was no duty upon Gardner to tell either Roberts or Large anything about the guarantee: *Cooper v. National Provincial Bank, Limited*, [1946] K.B. 1 at 5, [1945] 2 All E.R. 641. Even on Large's own evidence, he knew that the document he signed had to do with the affairs of the defendant company. He was a vice-president and a half-owner of the company at the time. He was interested in assisting the company in its business. I cannot accept his explanation that he thought that the document he signed had to do with the signing of cheques.

I cannot find that the plea of *non est factum* is applicable. Large knew that he was signing a document for the benefit of the defendant company. The evidence does not even suggest that Gardner, the plaintiff's manager, was a party in any way to obtaining the signature of Large to the guarantee. Certainly Roberts was not an agent of the plaintiff bank. There was no arrangement between the plaintiff's manager and Roberts that the latter should obtain the signature of the defendant Large to the guarantee. There was no conversation other than that set out above, with reference to the guarantee when it was signed. There was no misrepresentation as to the guarantee. The defendant Large did not read the guarantee, although he could have done so and would have understood the effect of it. He was clearly negligent in not reading the guarantee before signing it. He cannot now take advantage of his own negligence after the plaintiff bank has acted upon the guarantee. It was his act that involved the plaintiff in loss. The signing of the guarantee was for the purpose of enabling the defendant company, of which the defendant Large was vice-president and a one-half owner, to obtain credit at the plaintiff bank, and it was by reason of the signing by the defendant Large that credit was given.

The evidence satisfies me that the defendant Large was content to sign the guarantee with the intention that that which preceded his signature should be taken as his act and deed, whatever it contained: see *Canadian Bank of Commerce v. Dembeck*, 24 Sask. L.R. 186, [1929] 2 W.W.R. 556, [1929] 4 D.L.R. 220 at 222, where McKay J.A. says:

"In my opinion the law is, that if a person who cannot read a document signs the same, without requesting to have it read or explained, he is bound by it. The law in this respect is thus stated in Leake on Contracts, 7th ed., p. 214:

" 'If a person who is unable to read is informed of the contents of a deed or writing by another person reading or explaining it to him, and it is read or explained erroneously, he may deny that it is his deed; for it is at the risk of the party to whom the deed is made, being present, that the true effect be declared, if required; but if he do not require it, he is bound by the deed.'

"*Simons v. G.W.R. Co.* (1857), 2 C.B.N.S. 620, 140 E.R. 560; *Howatson v. Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1. See also *Thoroughgood's Case* (1585), 2 Co. Rep. 9a, 76 E.R. 408, where

it was held that if an illiterate man execute a deed without requiring it to be read or explained to him, the deed is binding upon him. In *Carlisle & Cumberland Bkg. Co. v. Bragg*, [1911] 1 K.B. 489, at p. 495, Buckley, L.J., thus expresses himself on this point:—

“The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained.”

This statement of the law is particularly applicable to the case at bar, because, as set out above, the defendant Large had ample opportunity to read the guarantee and would have fully appreciated the purport of it if he had read it. For reference also see: *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704 at 711; *Marks v. The Imperial Life Assurance Company of Canada*, [1949] O.R. 49, [1949] 1 D.L.R. 613, 15 I.L.R. 195, affirmed [1949] O.R. 564, [1949] 3 D.L.R. 647, 16 I.L.R. 115; *Gold Medal Furniture Co. v. Stephenson* (1913), 23 Man. R. 159, 4 W.W.R. 7, 23 W.L.R. 664, 10 D.L.R. 1; *Bradley v. Imperial Bank of Canada*, 58 O.L.R. 650, [1926] 3 D.L.R. 38; and *Rose v. Mahoney* (1915), 34 O.L.R. 238, 24 D.L.R. 326.

For the above reasons judgment will go for the plaintiff for \$16,128.37 with interest from 26th April 1949 at 5½ per cent. and for costs.

Judgment for plaintiff.

Solicitors for the plaintiff: Tilley, Carson, Morlock & McCrimmon, Toronto.

Solicitors for the defendant Large: Manley & Ford, Toronto.

[COURT OF APPEAL.]

McMaster et al. v. Byrne.

Appeals—Privy Council—Effect of Legislation—Proceedings Commenced before Coming into Force of Statute—Appeal “permitted under the law of Canada”—An Act to Amend the Supreme Court Act, 1949, 2nd sess. (Can.), c. 37, ss. 3, 7—The Privy Council Appeals Acts, R.S.O. 1937, c. 98, s. 1; 1950 (Ont.), c. 57, ss. 1, 5.

An appeal may still be taken direct from the Court of Appeal for Ontario to His Majesty in his Privy Council in actions commenced before 25th December 1949 and otherwise within the provisions of s. 1 of The Privy Council Appeals Act, R.S.O. 1937, c. 98. Although the Parliament of Canada, by An Act to Amend the Supreme Court Act, 1949, expressly abolished such a right of appeal in future cases, it expressly excepted from the provisions of the statute proceedings commenced before it came into force. The Ontario statute of 1950, repealing The Privy Council Appeals Act, likewise made an express exception for the case of an appeal “that is permitted under the law of Canada”. It is true that the right of appeal in such a case is not created by any law of Canada, but it is the law of Canada that prohibits generally appeals to the Privy Council from any Court in Canada, but with a saving clause within which the appeal comes.

AN APPEAL by the defendant, by leave of Laidlaw J.A., from an order of Hope J.A., admitting an appeal by the plaintiffs to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal, [1951] O.W.N. 1, [1951] 1 D.L.R. 593, affirming the judgment of Smily J., [1950] 3 D.L.R. 815.

1st March 1951. The appeal was heard by ROBERTSON C.J.O. and ROACH and MACKAY JJ.A.

G. W. Mason, K.C., for the defendant, appellant: The sole question is whether this is an appeal “that is permitted under the law of Canada”, within the language of s. 5 of The Privy Council Appeals Act, 1950 (Ont.), c. 57. The history of appeals to the Privy Council is set out in 8 Halsbury, 2nd ed. 1933, pp. 548-552, ss. 1214-1220. Generally speaking, the right of appeal was a matter of prerogative, and that prevailed until it was surrendered or dealt with by appropriate legislation. Before 1949 there was clearly no right of appeal from the Court of Appeal for Ontario to the Judicial Committee of the Privy Council by virtue of any law of Canada. Such an appeal lay (1) by reason of a prerogative right, and (2) under The Privy Council Appeals Act, R.S.O. 1937, c. 98.

This case clearly comes within s. 7 of An Act to Amend the Supreme Court Act, 1949, 2nd sess. (Can.), c. 37. The effect of s. 7 is to nullify the new s. 54(2), enacted by s. 3 of

the same statute, in cases to which s. 7 applies, and leave the law, in such cases, exactly as it was.

The Legislature of Ontario, by the 1950 statute, expressly abolished the right of appeal by repealing The Privy Council Appeals Act, except in cases where an appeal "is permitted under the law of Canada". There is a difference between saying that an appeal is not prohibited (the appropriate language in this case) and saying that it is permitted. It is true that there is nothing in the law of Canada that prohibits this appeal, but there is also nothing in the law of Canada that permits it, which is a very different matter, and the proper approach to the question here involved.

A. C. Heighington, K.C. (S. G. M. Grange, with him), for the plaintiffs, respondents: The right to appeal to the Privy Council has existed in Canada for many years. The history of such appeals was discussed, and the royal proclamation of 1763 was referred to, in *Patton et al. v. Yukon Consolidated Gold Corporation Limited et al.*, [1942] O.R. 92, [1942] 2 D.L.R. 301, and *Montreal Trust Company v. Abitibi Power & Paper Company Limited*, [1942] O.R. 321, [1942] 3 D.L.R. 17; see also *McBride v. Ontario Jockey Club Ltd.*, 58 O.L.R. 267, [1926] 1 D.L.R. 743.

Under the decision in *Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*, [1947] A.C. 127, [1947] 1 All E.R. 137, [1947] 1 D.L.R. 80, [1947] 1 W.W.R. 305, the Parliament of Canada could prohibit any Canadian from asserting rights given to him under a provincial statute, but it has not done so. It is obvious that both the Ontario Legislature and the Canadian Parliament intended to preserve the right of appeal in cases then pending. Section 5 of The Privy Council Appeals Act, 1950 (Ont.), c. 57, must mean that any prior existing right of appeal, which has not been taken away by the Dominion, is preserved, and such an appeal should be deemed to be "permitted" by the Dominion.

The Court must place on both Acts the interpretation contemplated by s. 10 of The Interpretation Act, R.S.O. 1950, c. 184, and if they are so interpreted it is difficult to come to any other conclusion than that the intention was to preserve the right of appeal in existing cases.

Murray's New English Dictionary, 1909, defines "permit" as "to allow, suffer, give leave; not to prevent", and "permitted" as "allowed; not forbidden or hindered". The Dominion Parliament had power to wipe out all appeals, but it did not; it allowed them, suffered them, did not prevent, hinder or prohibit them. I refer to *Macartney v. Miller* (1905), 7 Terr. L.R. 367, 2 W.L.R. 87 at 89; *Simpson v. The Great Western Railway Company* (1859), 17 U.C.Q.B. 57; Sanagan and Drynan, Words and Phrases, 1941, s.v. "permit"; Burrows, Words and Phrases Judicially Defined, 1944, vol. 4, p. 220, s. 463; *Berton et al. v. Alliance Economic Investment Company, Limited et al.*, [1922] 1 K.B. 742 at 759; *Barton et al. v. Reed*, [1932] 1 Ch. 362.

As to the words "permitted under the law of Canada", for many years appeals to the Judicial Committee were permitted by the law of Canada, and that is still the law as to those that have not been prohibited by the 1949 statute. The Dominion law still allows those appeals to be taken. Further, the law of Ontario is part of "the law of Canada".

In The Privy Council Appeals Act, R.S.O. 1937, c. 98, the Ontario Legislature merely limited the right of appeal; it did not, and could not, create it.

If there is any flaw in the order appealed from, this Court has power to grant leave, under Rule 2 of the Privy Council Rules, without regard to the Ontario statute.

G. W. Mason, K.C., in reply: The argument based upon s. 10 of The Interpretation Act cannot prevail as to the Dominion statute of 1949. Its whole purpose was not to give a remedy but to prohibit appeals except to the Supreme Court of Canada.

It is of no assistance to take definitions given in other circumstances and under different statutes, and attempt to apply them here.

The right of appeal to the Privy Council was never part of the law of Canada. Appeals to the Privy Council in civil matters were not regarded as being within Dominion competence.

As to the power of this Court to grant leave to appeal, apart from the order in appeal, it would be necessary first to decide whether the case was a proper one in which to grant leave.

Cur. adv. vult.

22nd March 1951. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the defendant in the action from the order of Hope J.A., dated 12th January 1951, admitting the appeal of the plaintiffs to His Majesty in his Privy Council, from the judgment of this Court dated the 8th November 1950, affirming the judgment of Smily J. dated 27th April 1950, dismissing the plaintiffs' action. This appeal from the order of Hope J.A. admitting the plaintiffs' appeal is taken by leave granted by Laidlaw J.A. by order dated 30th January 1951.

It is not disputed that but for the recent enactment of certain legislation by the Parliament of Canada and by the Legislature of the Province of Ontario that affects the taking of appeals from Canada to His Majesty in his Privy Council, the plaintiffs would have an appeal as of right direct to His Majesty in his Privy Council from the judgment of this Court affirming the judgment of Smily J. dismissing the plaintiffs' action. This right of appeal they would have under an Ontario statute, The Privy Council Appeals Act, R.S.O. 1937, c. 98. The whole dispute is with respect to the effect of the recent enactments upon the right of appeal in this case.

The Privy Council Appeals Act by s. 1 enacts as follows:

"1. Where the matter in controversy in any case exceeds the sum or value of \$4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council, and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

While appeals to His Majesty in his Privy Council were also otherwise provided for, the provincial statute I have quoted alone gave a right of appeal direct from the Ontario Court of Appeal to His Majesty in his Privy Council, and it

is this right of appeal that the plaintiffs desire to exercise, and that the defendant says has been taken away.

In 1949 the Parliament of Canada passed an Act (13 Geo. VI, 2nd sess., c. 37) to amend The Supreme Court Act. By s. 3 of that Act it was provided as follows:

"Section fifty-four of the said Act is repealed and the following substituted therefor:

"54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

"(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal lies or shall be brought from or in respect of the judgment of any court, judge, or judicial officer in Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

"(3) *The Judicial Committee Act, 1833*, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and *The Judicial Committee Act, 1844*, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

Section 7 of the statute is as follows:

"Notwithstanding anything in section three of this Act, an appeal from or in respect of a judgment pronounced in

"(a) a judicial proceeding that was commenced prior to the coming into force of this Act, or

"(b) a reference made by the Governor in Council or by the Lieutenant-Governor in Council of a province prior to the coming into force of this Act,

lies or may be brought as if that section had not been enacted."

The plaintiffs' action was commenced by writ of summons issued out of the Supreme Court of Ontario on the 15th September 1947. The Act to amend The Supreme Court Act was assented to on 10th December 1949. By s. 8 of the statute

it was provided that the Act should come into force on a date to be fixed by proclamation of the Governor in Council. Such a proclamation bringing the statute into force was made and published in an extra issue of the Canada Gazette on the 23rd December 1949. (See vol. 83, p. 4932.)

Some years before the passing of the statute to amend The Supreme Court Act in 1949 a bill was introduced and had its first reading in the House of Commons at Ottawa on 23rd January 1939. The bill contained, as s. 1, provisions that closely resemble but are not in every word the same, although substantially of the same effect, as s. 3 of the Act passed in 1949 to amend The Supreme Court Act. The debate on the motion for the second reading of this bill was adjourned in order that steps might be taken to obtain a judicial determination of the question of the legislative competence of the Parliament of Canada to enact its provisions in whole or in part. A question was thereupon submitted to the Supreme Court of Canada in the following terms:

“Is said Bill 9 entitled ‘An Act to Amend the Supreme Court Act’ or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada?”

It was held by the Court, with some dissent, that the Parliament of Canada was competent to enact the bill in its entirety. The judgments are reported in [1940] S.C.R. 49 (*sub nom. Re “An Act to Amend the Supreme Court Act”*), [1940] 1 D.L.R. 289 (*sub nom. Re Privy Council Appeals*). The bill in respect of which the question was submitted is to be found at p. 51 of the report.

From the judgment of the Supreme Court of Canada on this reference an appeal was taken to His Majesty in his Privy Council, and the judgment on that appeal is reported, *sub nom. Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*, in [1947] A.C. 127, [1947] 1 All E.R. 137, [1947] 1 D.L.R. 801, [1947] 1 W.W.R. 305. It was held that Bill 9 was wholly *intra vires* of the Parliament of Canada, which, accordingly, was competent to enact, in regard to both appeals from the Supreme Court of Canada and appeals direct from the provincial Courts to His Majesty in Council, that the

Supreme Court of Canada should have exclusive and ultimate jurisdiction, both civil and criminal.

In view of this judicial opinion as to the power of the Dominion Parliament to enact legislation substantially in the terms of the Act to amend The Supreme Court Act, passed in 1949, there would seem to be no substantial ground for questioning the right of the plaintiffs to exercise the right of appeal to His Majesty in his Privy Council under the Ontario statute, The Privy Council Appeals Act, if matters had rested there.

In 1950, by 14 Geo. VI, c. 57, the Legislature of the Province of Ontario repealed The Privy Council Appeals Act, R.S.O. 1937, c. 98. There is, however, a saving clause, enacted as s. 5, and it is as follows:

"Any appeal to His Majesty in His Privy Council that is permitted under the law of Canada may be taken as if this Act had not been passed and for the purposes of any such appeal the provisions repealed by this Act shall remain in force."

The real question on the present appeal is whether this saving clause is effective to preserve the plaintiffs' appeal.

In my opinion the Provincial Legislature had the power to repeal its own statute, and this power to repeal had been in no way impaired by the Dominion statute of the preceding year. The saving clause in the Dominion statute only saved the plaintiffs' right of appeal from the prohibition of the Dominion enactment, and could have no effect upon the power of the Province to repeal the provincial statute. Section 13 of The Interpretation Act, R.S.O. 1937, c. 1, is as follows:

"Every Act shall be construed as reserving to this Legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege or advantage thereby vested in or granted to any person or party, whenever the repeal, amendment, revocation, restriction or modification is deemed by the Legislature to be required for the public good."

On the passing of the provincial statute of 1950 the situation was this: the Parliament of Canada, acting within its jurisdiction, had prohibited the taking of an appeal from any Court in Canada to the Privy Council, except in certain

excepted cases, within which exceptions the plaintiffs' case comes. The Legislature of Ontario thereupon, thinking no doubt that a provincial statute which, by reason of the Act passed by the Parliament of Canada, had become or was about to become a dead letter, had better be removed from the statute book, repealed The Privy Council Appeals Act, which alone gave the plaintiffs the right of appeal they sought to exercise. This repeal was, however, not absolute, but was also subject to a saving clause, which I have quoted. In my opinion that appeal comes properly within the description of an appeal to His Majesty in his Privy Council that is permitted under the law of Canada. It is true that the right of appeal is not created by any law of Canada, but it is the law of Canada that prohibits generally appeals to His Majesty in his Privy Council from any Court in Canada, but with a saving clause within which the plaintiffs' appeal comes.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Mason, Foulds, Arnup, Walter & Weir, Toronto.

Solicitors for the plaintiffs, respondents: Symons, Heighington & Symons, Toronto.

[COURT OF APPEAL.]

Haberl v. Richardson and Richardson.

Motor Vehicles—Liability of “Owner”—Registered Owner not beneficially Entitled to Vehicle—Effect of Registration—Control and Dominion—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50(1).

The “owner” of a motor vehicle, for purposes of s. 50(1) of The Highway Traffic Act, which imposes liability upon an owner for loss or damage sustained as the result of negligence in the operation of the vehicle, is not necessarily the registered owner, but the real owner, the person having dominion over and control of the vehicle. *Wynne v. Dalby* (1913), 30 O.L.R. 67; *Comer v. Kowaluk et al.*, [1938] O.R. 655, applied.

AN APPEAL by the defendant Albert Richardson from the judgment of Spence J. against both defendants.

1st March 1951. The appeal was heard by HENDERSON, HOPE and GIBSON JJ.A.

W. B. Williston, for the appellant: The word “owner” as used in s. 50(1) of The Highway Traffic Act, R.S.O. 1950, c. 167, must mean the actual or real owner in the sense of the person having dominion over or control of the automobile: *Comer v. Kowaluk et al.*, [1938] O.R. 655, [1938] 4 D.L.R. 181. The important consideration, in cases under the Act, is who has control of the automobile.

Registration is only *prima facie* evidence of ownership, and may be rebutted: *Griffis v. Self* (1938), 8 Fortnightly L.J. 111; *Charlebois et al. v. Wells*, [1947] 1 W.W.R. 1121, [1947] 3 D.L.R. 919; *Sleigh v. Stevenson*, [1943] O.W.N. 292, 10 I.L.R. 246, affirmed [1943] O.W.N. 465, 10 I.L.R. 287, [1943] 4 D.L.R. 433; *Meiklereid v. West* (1876), 1 Q.B.D. 428.

The owner is the person legally entitled to possession, not the person who has title. The term “owner” as used in The Highway Traffic Act is not to be understood in its strict or technical sense, and is not intended to include a person who, though technically the owner, has neither possession of nor control over the vehicle, nor control over the driver: *Wynne v. Dalby* (1913), 30 O.L.R. 67, 16 D.L.R. 710. It must refer to the actual or beneficial owner rather than to the person in whom legal title is vested: *In re G. B. Wood Limited*; *Spivak et al. v. Lee*, 40 Man. R. 613 at 620, [1932] 3 W.W.R. 525.

The learned trial judge erred in holding that he was bound by the terms of the documents, and in refusing to give weight to the oral evidence, which he expressly said he was prepared to

accept. Extrinsic evidence to contradict or vary a written agreement is excluded only in proceedings between parties to the agreement and their privies; it is proper and admissible in proceedings between a party to the agreement and a stranger: *Gray v. Nord et al.*; *Oliver et al. v. Nord et al.*, [1936] 1 D.L.R. 650, affirmed [1936] 2 W.W.R. 489, [1936] 4 D.L.R. 182 at 185; Phipson on Evidence, 7th ed. 1930, p. 55.

There can be no estoppel as against the plaintiff, who did not rely on the registration, and was not prejudiced by it.

B. Grossberg, K.C., for the plaintiff, respondent: The son in his pleading admitted that the father was the owner, and it is not open to him to adduce evidence as to the ownership of the car: Wigmore on Evidence, 3rd ed., 1940, s. 1064 (vol. 4). Further, there is evidence to show that the son did not know who was the seller of the car; this was known only to the father.

Albert Richardson could control the vehicle and had dominion over it, and was the owner by reason of the contract of purchase by him. Legal remedies to obtain payment were exercisable against him alone. The inference must be that the son's control was by permission of his father.

Where a motor vehicle is knowingly registered in the name of one person as owner it would amount to fraud for him, in such circumstances as are here present, to deny his ownership: *Shuba v. Greendonner* (1936), 271 N.Y. 189; *Reese v. Reamore et al.* (1944), 292 N.Y. 292.

J. D. Hilton, for the Minister of Highways, called on as *amicus curiae*, adopted the argument submitted for the plaintiff, respondent.

W. B. Williston, in reply: There is no moral turpitude on our part. We did not intend to deceive. If the plaintiff wishes to rely on an estoppel he must show that he was deceived: *Gray v. Nord et al.*, *supra*. Where a legislature intends to impose liability upon a person it must do so in clear and precise language.

Cur. adv. vult.

2nd April 1951. HENDERSON J.A.:—An appeal from the judgment of Mr. Justice Spence on the 2nd November 1950, in favour of the plaintiff against both defendants, for \$11,271.50 and the costs of the action. The action is for damages for injuries sustained by the plaintiff when struck by a motor car owned and

driven by the defendant George Richardson, who is the son of the defendant Albert Richardson.

The facts are not in dispute, and are as follows: The defendant George Richardson purchased the motor car in question from its previous owner and, being at that time below the age of 21 years, obtained his father, the defendant Albert Richardson, to appear as the owner for the purpose of obtaining a loan to finance the purchase from a finance company engaged in that business. As between the defendant Albert Richardson and the finance company the former appeared as owner, and he pledged his credit to the finance company for the moneys borrowed to complete the payment of the purchase-money of the car. Although the car was registered with the Registrar of Motor Vehicles in the name of the father as owner, the defendant Albert Richardson was not the real owner. The car was bought and paid for by the son. It was never in the possession of the defendant Albert Richardson, nor was it ever under his control. The control and possession of the car after its purchase by the defendant George Richardson was always in him as the owner, and not by any permission of his father.

The Court was invited by Mr. Grossberg, and also by Mr. Hilton, to apply the laws of the State of New York as declared in two decisions referred to by them. The decisions which have been reached in the Province of Ontario, however, are that the owner referred to in our statute is the real owner, the person having dominion over and control of the car.

In *Wynne v. Dalby* (1913), 30 O.L.R. 67, 16 D.L.R. 710, the Appellate Division of this Court, consisting of Meredith C.J.O., Magee and Hodgins J.J.A., and Sutherland J., affirmed the trial judgment of Kelly J. In delivering the judgment of the Court Sir William Meredith, at p. 72, said: "The word 'owner' is an elastic form, and the meaning which must be given to it in a statutory enactment depends very much upon the object the enactment is designed to serve."

And again at p. 74: "The purpose of sec. 19 was . . . to render the person having dominion over the vehicle, and in that sense the owner of it, answerable . . . and I do not think that it can have been intended to fix the very serious responsibility which the section imposes upon one who, . . . at the time the accident happened, had neither the possession of nor the domin-

ion over the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in land is the owner of the land."

Mr. Williston has filed with the papers extracts from the statutes of the various Provinces of Canada in which an owner is defined, all of which materially differ from the Ontario statute.

Upon the facts which I have outlined, I am of opinion that the appeal by the defendant Albert Richardson should be allowed with costs, and that the action as against him should be dismissed. In view, however, of the fact that the real ownership of the car was not disclosed until the trial, I do not think the appellant should be entitled to the costs of the trial. The respondent, as plaintiff at the trial, will remain entitled to one set of costs of the trial.

HOPE J.A., agrees with HENDERSON J.A.

GIBSON J.A.:—This is an appeal by the defendant Albert Richardson from the judgment of Mr. Justice Spence in an action tried without a jury arising out of an accident that occurred on the 26th September 1948, in which the plaintiff received injuries when struck by an automobile driven by the defendant George Richardson.

At the trial there was controversy as to the ownership of the automobile. It appears that the defendant George Richardson, an infant under 21 years of age, desired to purchase a car from one Reginald Butcher and the price agreed upon was \$900. The evidence discloses that George Richardson, not having the full amount of the purchase-price available, paid the sum of \$300 of his own money and arrangements were made to finance the balance through Merchants Finance Limited of Toronto.

George Richardson, being a minor, was unable to deal with the finance company and in December 1947 the father, the defendant Albert Richardson, executed a conditional sale contract for the sum of \$620, describing himself therein as the purchaser of the car.

On 12th March 1948 Albert Richardson made application for a transfer of the motor vehicle licence for the car showing therein that he had purchased the car from Reginald Butcher on the 29th December 1947, and at the same time he applied

for registration of the car for 1948, describing himself as the owner.

After the finance company had been paid in full the defendant Albert Richardson signed an application on the 29th October 1948, transferring the passenger motor vehicle permit from himself, as the registered owner, to the defendant George A. Richardson.

At the trial judgment was entered for the plaintiff against both defendants, the learned trial judge holding that the father Albert Richardson at the time of the accident was the owner of the car.

The evidence of the defendants, all of which the learned trial judge states he is quite ready to accept, is to the effect that the father never at any time had control of the automobile but that he had signed the conditional sale agreement to enable his son to purchase the car and that the money paid to the vendor as a deposit and paid to the finance company under the conditional sale agreement was provided entirely by the son from his own resources.

Furthermore, the son at all times held the keys and the registration card of the car and retained the car for his own exclusive use without requiring any permission or consent from his father and the car was not kept in the father's garage.

The defendant Albert Richardson owned another automobile of his own which he used himself and kept in his own garage.

The learned trial judge, while accepting the evidence of the defendants as to the circumstances surrounding the purchase of the car, states: "Nevertheless I hold that the interpretation in law of that evidence is that the father was the owner." In support of his finding he states: "The father pledged the automobile to the finance company, and the father borrowed from the finance company the \$600 odd necessary to pay the balance on the automobile. And the father undertook to repay that amount in equal instalments." He further states: "It has been stressed . . . that in the case at bar the son had the sole dominion of and control over the automobile. I think he did that only by the permission of his father, and as part of the transaction."

With great deference I must disagree with the findings of the learned trial judge. While in the statutes of some of the Provinces the "owner" of a motor vehicle is described as "a person

who holds the legal title of a motor vehicle", and in The Vehicles Act of Saskatchewan, 1945, c. 98, " 'owner' means the person in whose name a motor vehicle is registered", our Highway Traffic Act contains no such definition. Section 50(1) of The Highway Traffic Act, R.S.O. 1950, c. 167, states: "The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway . . . ", and it has frequently been held in Ontario that the owner within the meaning of the statute is the person having dominion over and control of the car.

In the case of *Comer v. Kowaluk et al.*, [1938] O.R. 655, [1938] 4 D.L.R. 181, a father purchased a car for his son, the father providing the purchase-money, the car remaining under the dominion and control of the father. As stated in that case by Middleton J.A.:

"The Highway Traffic Act, R.S.O. 1937, ch. 288, sec. 47, provides that the owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of such motor vehicle on a highway, unless the case falls within certain exceptions not here material. Originally, when enacted, this section made the owner liable without the exceptions now provided. The effect of the section, as it originally was, was determined in a series of cases about the year 1913. These cases established that the word 'owner' in the section, as it then was, had no defined meaning, but was capable of flexible interpretation to meet the cases as they arose from time to time. Applying this principle, the vendor of an automobile, held under a hire receipt particularly reserving the property to the vendor, was not the owner within the statute. The owner was the purchaser whose title was equitable and qualified, but he was the one having dominion over, and control of the car, and therefore, the owner within the meaning of the statute, and the one upon whom the statutory liability for accidents arising from the negligent operations of the car was imposed. These cases are *Wynne v. Dalby* (1913), 30 O.L.R. 67 [16 D.L.R. 710]; *Lowry v. Thompson* (1913), 29 O.L.R. 478 [15 D.L.R. 463]; and *Cillis v. Oakley* (1914), 31 O.L.R. 603 [20 D.L.R. 550]. These cases still continue applicable for the purpose for which I have cited them, notwithstanding the change in 1929 (19 Geo. V, ch. 68) which

modified the drastic nature of the original provisions of the statute."

In the earlier case of *Wynne v. Dalby*, *supra*, it was stated by Meredith C.J.O.:

"The purpose of sec. 19 was, I think, to avoid any question being raised as to whether a servant of the owner, who was driving a motor vehicle when the violation of the Act or regulation took place, was acting within the scope of his employment, and to render the person having the dominion over the vehicle, and in that sense the owner of it, answerable for any violation in the commission of which the vehicle was the instrument, by whomsoever it might be driven; and I do not think that it can have been intended to fix the very serious responsibility which the section imposes upon one who, like the respondent, at the time the accident happened, had neither the possession of nor the dominion over the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in land is the owner of the land."

In this case the defendant George Richardson undoubtedly had possession and control of, and complete dominion over, the car, and while the defendant Albert Richardson, by reason of his contract with the finance company, would be estopped from denying ownership in himself in order to avoid the provisions of the contract, there was no such relationship between the said Albert Richardson and the plaintiff herein. While the common law liability of an owner of a motor vehicle has been enlarged by the provisions of The Highway Traffic Act, the liability so created should not, in my opinion, go beyond the strict interpretation of that Act.

Under the circumstances I would allow the appeal with costs, but, as the defendant Albert Richardson was registered as the owner of the motor vehicle, I would dismiss the action as against him without costs.

Appeal allowed with costs.

Solicitor for the plaintiff, respondent: Onie Brown, Toronto.

Solicitors for the defendant Albert Richardson, appellant: Richardson & Shearer, Toronto.

Solicitor for the defendant George Richardson: E. H. Silk, Toronto.

[GALE J.]

Re Robertson.

Executors—Direction to Carry on Testator's Business—Payments to be Made out of "net annual income"—Allocation out of Income of Reserve for Depreciation—Propriety of Course.

Where executors and trustees are empowered by the will to carry on the business of the testator, and directed to make certain payments out of the "net annual income" of the business, they are not only entitled but required to set aside out of the gross income a reasonable allocation in each year to cover depreciation of the capital assets of the business, and to distribute only what is left after this allocation has been made. *Re Crabtree; Thomas v. Crabtree* (1912), 106 L.T. 49; *Re Rose's Will* (1939), 14 M.P.R. 223, applied. Whether or not the amount so allocated is reasonable is a matter of evidence in each case. *Glasier v. Rolls* (1889), 42 Ch. D. 436 at 453, agreed with.

Depreciation is merely the service loss sustained by a capital asset during its span of life, and has been accurately defined in *Lindheimer et al. v. Illinois Bell Telephone Co.* (1934), 292 U.S. 151 at 167, as "the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property". While several methods of measuring depreciation may be applied, the position of a commercial undertaking cannot be accurately fixed until depreciation has been taken into account. It is wrong to expect a search for "real" or "actual" depreciation, and the quantum is not necessarily the amount by which the acquired cost of assets exceeds their present exchange value, or even the proceeds obtained upon realization otherwise than at the end of their existence. If the life expectancy of a group of assets can be established, and those clothed with the responsibility decide to absorb the anticipated loss by allocating a proportionate amount in each year to a depreciation reserve, the true quantum of depreciation affecting all of the assets can be thereby determined, even though the group of assets is constantly changing by replacement of individual units.

AN APPEAL and cross-appeal from an order of Macdonell Sur. Ct. J., of the Surrogate Court of the County of York, on passing the accounts of the executors and trustees of John Ross Robertson, deceased.

1st, 2nd and 6th June 1950. The appeal and cross-appeal were heard by GALE J. in chambers at Toronto.

C. F. H. Carson, K.C., A. S. Pattillo, K.C., and A. J. MacIntosh, for the appointed trustees, appellants.

G. W. Mason, K.C., for the executors of the widow, cross-appellants.

J. Shirley Denison, K.C., and G. E. Hill, for the surviving executrix of Irving Earle Robertson, cross-appellant.

D. K. Heddle, for the executrix of John Sinclair Robertson, cross-appellant.

H. L. Steele, K.C., for the executors and trustees.

G. T. Walsh, K.C., and T. Sylvester, for the Queen Elizabeth Hospital.

R. H. Sankey, K.C., for the Infants Home and Infirmary.

J. R. Rumball, K.C., for the Grand Lodge, A.F. & A.M.

22nd March 1951. GALE J.:—The appeal from the Surrogate Court Judge in this matter will be allowed and his order will be varied to provide that The Hospital for Sick Children is to receive the entire sum of \$770,970.23 which is here in issue. That means, of course, that the cross-appeal does not require consideration.

The late John Ross Robertson died on the 31st May 1918, after making a rather elaborate will, particularly with respect to the operation of the business of The Evening Telegram, of which he was the proprietor. Under clause 15 the executors and trustees were directed to "carry on the business" and in connection therewith it was stipulated that they should "at all times have absolute control and management of the said business and property free from the interference of any other person or persons firm or corporation directly or indirectly". Clause 16, which is of particular importance, commences "And upon the further trust out of the general income of my estate including the net annual income properly divisible as profits derived from the Evening Telegram business . . . to pay the following sums" annually to certain persons and to The Hospital for Sick Children (hereafter referred to as "the Hospital"). Included in the fourth part of that clause was a direction that "the remainder of such net annual income" be held and invested and be disposed of in the same manner as the residue of the estate. By clause 22 the newspaper business was to be sold after the death of the testator's widow and two sons and the proceeds thereof, together with the remainder of the residue of the estate, were to be paid over to trustees to be appointed by the Hospital.

The widow of the deceased, who outlived his sons, died on the 11th July 1947.

The executors and trustees carried on The Evening Telegram business in accordance with the terms of the will and amassed substantial sums of surplus profits under the fourth part of clause 16. By order of Mr. Justice McTague dated 16th November 1939, *Re Robertson*, [1939] O.W.N. 569, [1939] 4 D.L.R. 511, it was held, however, that the direction in the lastly mentioned sub-clause to accumulate "the surplus income" from the testator's residuary estate "ceased to have any force or effect after 31st May, 1939, being twenty-one years from the date of the

Testator's death", and that there was "an intestacy as to such surplus income in so far as the same is directed to be accumulated after the 31st day of May 1939 until, but not after, the date of the death of the Testator's widow, . . . and that such surplus income during such period is distributable equally among the testator's next-of-kin". Thus, the provisions of The Accumulations Act, R.S.O. 1937, c. 153, were applied with respect to surplus income and for the period from 31st May 1939 to 11th July 1947, the date of the death of the widow, the excess income was distributed annually among the next-of-kin.

In December 1948 the newspaper business was sold for something in excess of \$3,610,000 and the executors and trustees are still engaged in the process of transferring the residue of the estate to the trustees appointed by the Hospital.

By order dated 6th September 1946 Judge Barton, as Surrogate Judge, passed the accounts of the executors and trustees for the period from 31st May 1939 to 31st December 1944, and following the sale of the business their accounts for the period from 31st December 1944 to 11th July 1947 were presented to Judge Macdonell for approval. In addition to the statements usually filed with respect to estates there were included annual summaries covering the operation of The Evening Telegram which disclosed that from and after 31st May 1939 there was allocated in each fiscal year an amount to take care of depreciation on the buildings, plant and equipment used in connection with the business. Those allocations totalled \$770,970.23 for the period and there was, therefore, an equivalent diminution of the aggregate income paid to the persons entitled thereto, who will hereafter be termed "the life tenants". Of that sum \$472,308.51 was charged for depreciation during the period covered by Judge Barton's order and the balance of \$298,661.72 during the period considered by Judge Macdonell.

Perhaps a word might be in order at this stage about the system employed by the executors and trustees with respect to depreciation. The records of the business were examined by Mr. McDonald, a competent chartered accountant, who testified that when a new set of books of account was established on 1st January 1917 the buildings used in the business were shown at \$280,798.10 and the plant and equipment at \$347,002.81, and that thereafter in each of the financial periods for which accounts

were prepared charges were made to profit and loss in respect of depreciation. The witness stated that in the period from 1917 to 1921 the rates of depreciation were something less than 4 per cent. on the gross book value of the buildings and something less than $7\frac{1}{2}$ per cent. on the gross book value of plant and equipment, that in 1921 and 1922 the rates used were 4 per cent. and $7\frac{1}{2}$ per cent. respectively, that in the period from 1922 to 1929 a round sum of \$80,000 was assigned to depreciation each year, and that from 1929 until the death of the widow the executors and trustees maintained a consistent policy of providing for depreciation on buildings at a rate of $2\frac{1}{2}$ per cent. per annum and on plant at a rate of $7\frac{1}{2}$ per cent. per annum. Throughout, the above rates were applied to the gross book values of the assets, which, as will be seen later, were altered in 1935. Though the charges for depreciation up to 31st May 1939 totalled approximately \$1,800,000, as of that date there was transferred to a new "Reserves-Depreciation" account the sum of \$792,530.98. No evidence was tendered to explain that figure. Mr. McDonald thought it ought to have been set at \$403,359.46, but as the Hospital was entitled to receive all surplus income earned to that date as well as the residue of the estate, the sums allocated to depreciation prior to 31st May 1939 are of little moment, except perhaps to serve as a basis for comparison with the amounts charged thereafter. As I have already stated, from 1939 on the same rates were used, and by 11th July 1947 the balance in the "Reserves-Depreciation" account was augmented by \$770,970.23, so that on the last-mentioned date the amount in that account was shown at \$1,563,501.21.

With one minor change, the accounts presented to Judge Macdonell went unchallenged save as to the above sum of \$770,970.23. The life tenants caused a surcharge to be filed in which it was contended that such sum had been improperly charged to and withheld from the income accruing to them during the period from 31st May 1939 to 11th July 1947, and that such amount "should be credited to income account . . . and cannot be credited to capital account except to the extent that the Trustees can show that part or all thereof is required to make good impairment of capital on the realization of The Evening Telegram Business and can show that any such transfer to capital account is not contrary to the provisions of The Accumu-

lations Act". The opposite view was taken by the trustees of the estate and by the trustees appointed by the Hospital, who urged that it was proper to make provision for reasonable and proper charges to cover depreciation of capital assets before ascertaining the yearly amounts divisible among the life tenants, pursuant to Mr. Justice McTague's order.

The Surrogate Judge upheld the contention of the life tenants by order dated 28th February 1950, and, if I correctly apprehend his reasons for judgment, came to the conclusion that there was no necessity to set apart any allowance for depreciation in the period from 31st May 1939 to 11th July 1949. He also decided, however, that the life tenants were not now entitled to question the aggregate of the sums charged for depreciation in those years covered by Judge Barton's order, with the result that the revenue account was increased by and the capital account charged with the sum of \$298,661.72, rather than with the greater sum of \$770,970.23. It was softly suggested before me that the learned judge did not intend to rule that depreciation charges were improper during that part of the period which was the subject of Judge Barton's order, but it is quite impossible to read his reasons for judgment in that way. If I were to sustain such an interpretation it would mean that there was no cause whatever for Judge Macdonell to consider, as he did, the effect of Judge Barton's order and the principles of *res judicata*. It is perfectly apparent that he did not purport to do so for the purpose of deciding whether Judge Barton's order precluded consideration by him of the matters raised in the surcharge, but on the contrary, did so to determine whether he had any power to deal with that part of the reserve account which was referable to the period dealt with by the former order. The form of the order which was issued supplies some confirmation for my view on the point.

This appeal has been taken by the appointed trustees, who ask that all the amounts charged for depreciation be approved so that the Hospital may receive the further sum of \$298,661.72. A cross-appeal has also been launched on behalf of the life tenants, who claim that the order of the Surrogate Court Judge should be varied to require division among those persons, not of the last mentioned amount, but rather of the full sum of \$770,970.23. The appeals were taken under the provisions of

s. 29 of The Surrogate Courts Act, R.S.O. 1937, c. 106, as amended by 1941, c. 58, s. 1, which has since been re-enacted by 1950, c. 81, s. 3. It will be readily seen that the issues to be decided are whether, in the circumstances, the executors and trustees were right in their belief that they could and should segregate annual amounts for depreciation of capital assets before determining the amount of income to be distributed to the life tenants, and, if so, whether the amounts withdrawn for that purpose from and after 31st May 1939 were proper. If either of those questions were answered in the negative, then the effect of Judge Barton's order would require examination. As I have already intimated, it is my opinion that the executors and trustees were obliged to make reasonable allowances for depreciation and that they did so in a just and proper way. It is not easy to disagree with one who is as experienced as Judge Macdonell, but I have given the matter most anxious consideration and find that, upon the main issue as to whether any depreciation is chargeable in the vital period, I must differ from him.

Before embarking upon a discussion of the merits of the appeal, I should first like to make some passing references to the positions taken by those who appeared for the life tenants. I have already drawn attention to the fact that in the surcharge it is alleged that there could be charged no depreciation except that which might be required to make good impairment of capital upon realization of the capital assets. I confess to some uncertainty as to the meaning of such an allegation. If in using the term "realization" there is contemplated only the sale of the business, then apparently the respondents adopt the attitude that in this case the right to make any deductions for depreciation depended upon the results achieved by the sale. If, on the other hand, it envisages an allocation to restore the foreseeable loss suffered during the economic life of each asset which depreciates, then I can have no quarrel with the proposition. As already mentioned, however, it is difficult to know what is there being suggested.

Somewhat different theories were advanced before me. Counsel for the executors of the widow's estate candidly stated that he had never argued that there should be no allowance for depreciation in the period in question, but contended that the rates of depreciation applied by the executors and trustees were

excessive and abnormal and for that reason should not be allowed. He also said that he could not subscribe to the judgment of the Surrogate Court Judge if it was intended to operate as a declaration (as I think it clearly was) that a reserve for depreciation can be created out of income in one period to such an extent as to relieve those entitled to income in succeeding periods from the burden of further similar deductions. On the other hand, counsel for the estate of one of the sons argued, firstly, that no provision could be made for depreciation during this period because such provision would offend The Accumulations Act and Mr. Justice McTague's order; secondly, that there was no right in law to charge the income with depreciation on the buildings; and, lastly, that the executors and trustees of the estate ought not to have assumed the responsibility of making any allocations for depreciation without first obtaining the approval of the Court. Many subsidiary points were also put forward and they will be discussed as I proceed, but the foregoing were the main contentions advanced by the respondents and it will be seen at once that several are quite incompatible. It occurs to me that those inconsistencies are brought about by a misconception of the true import of depreciation and a reluctance to accept as valid accounting methods usually instituted to prepare for the eventual exhaustion of capital assets.

There are two other preliminary matters which should be mentioned before the propriety of what was actually done by the executors and trustees with respect to depreciation is considered. Their counsel maintained that as they were granted an unfettered discretion to determine what part of the annual earnings of The Evening Telegram business would properly be divisible as profits, no decision made in the exercise of that discretion can be modified by the Court unless it was made dishonestly or in bad faith. That is not so. The duty of an executor or trustee is to act in accordance with the law and if in a contest between life tenant and remainderman the law does not permit depreciation deductions from income, or if it does and an error occurs in computing the deductions, it will not be enough for that executor or trustee to show that he made the deductions honestly and in good faith, even where the instrument under which he operates vests in him the responsibility of carrying on the business and determining the quantum of profits. Quite

innocently, he may have received and been relying upon advice which was bad, or it may be made to appear that while the advice was good, it was inadvertently misapplied. In either case the Court has not only the authority but also the obligation of rectifying the injustice which would otherwise ensue.

On the other hand, I do not concur in the suggestion advanced on behalf of the respondents that when Mr. Justice McTague's judgment was pronounced it became incumbent upon the executors and trustees to procure the sanction of the Court before encroaching upon income for further depreciation allowances. *In re Mason; Mason v. Mason*, [1891] 2 Ch. 467, was cited in support of this proposition, but there the estate was being administered by the Court. Had approbation been sought in this estate, I have no doubt that the executors and trustees would have been promptly informed that although their programme for depreciation might subsequently be reviewed, the subject was one for which they should assume initial responsibility.

I now propose to consider the question whether, in a situation such as this, depreciation is a proper factor to be taken into account when computing the amount of annual income, but it might be well first to study the true meaning of the term "depreciation" and the end which it serves. On p. 5 of his report, ex. 8, Mr. McDonald has set out several definitions of the word, many of which, though not authoritative, seem to me to be worthy of judicial approbation. In addition, I have been furnished with a copy of Bulletin no. 22 of the American Institute of Accountants, a report of the Committee on Terminology, which amplifies definition no. 8 in ex. 8, and with an extract from pp. 259-60 of the 7th edition of Montgomery's Auditing. For most purposes the description of the term contained in the judgment of the Supreme Court of the United States in *Lindheimer et al. v. Illinois Bell Telephone Co.* (1934), 292 U.S. 151 at 167, will suffice. It was there said that: "Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year." All of the definitions indicate that essentially depreciation is the service loss sustained by a capital asset during its span of life and nothing else. That is the first principle

to be remembered, and if it is, much confusion can be avoided. The second rule which must be kept in mind is that while any one of several methods of measuring the toll of depreciation may be invoked, the position of a commercial undertaking cannot be accurately fixed until depreciation has been taken into account. As Mr. McDonald testified, "In my opinion you cannot determine such profits [the annual profits of a business] without making a charge for depreciation." Whatever practice is employed, it should be (and I now quote from Bulletin no. 22, *supra*): "... a system of accounting which aims to distribute the cost or other basic value of tangible capital assets, less salvage (if any), over the estimated useful life of the unit (which may be a group of assets) in a systematic and rational manner. It is a process of allocation, not of valuation. DEPRECIATION FOR THE YEAR is the portion of the total charge under such a system that is allocated to the year. Although the allocation may properly take into account occurrences during the year, it is not intended to be a measurement of the effect of all such occurrences."

I believe that there has been faulty reasoning in the matter and that it is directly attributable to the fact that the basic principles set out above have not been given due recognition. For instance, I think it is wrong to expect or require the executors or trustees to search for something designated as the "real" or "actual" depreciation. If that means that each asset is to be individually appraised at the end of the fiscal period (which here would be the 11th July 1947), not only would the task be monumental, but the result would probably be quite unreliable, for although the observable condition of each asset might be ascertained by such a process, the incidence of obsolescence could not be measured with any degree of accuracy. Surely it is quite impossible to gauge with precision the degree of obsolescence affecting an article at any particular time. As Mr. McDonald said, "I do not know how one would ever find out what the actual depreciation was." He was addressing himself to the problem of assessing the extent of depreciation applicable to each single asset at any given moment. Much unwarranted criticism was levelled at the system employed by the executors and trustees on the ground that it was only an estimate of depreciation. In this regard, however, it should be pointed out that it was a correct and certain estimate of the real or actual

depreciation of the group of assets involved if the foundation upon which such estimate rested was sound. In other words, if the life expectancy of a group of assets can be established by evidence and those clothed with the responsibility decide to absorb the loss of usefulness to be expected by allocating a proportionate amount of that loss each year to a depreciation reserve, the true quantum of depreciation affecting all of the assets can be thereby determined. Even if the basis of calculation is unimpeachable, it does not follow, of course, that the period of economic utility of each piece of equipment is going to coincide exactly with the period assigned to the entire group. Some will have a much shorter life than the period appointed for the whole class, while others will outlive it. That is so because depreciating rates are not set for each asset or unit but are a composite average to be applied to the total cost of the units used in the undertaking. The system has another great advantage in that it will function though the group is changing constantly by retirements and replacements or additions of individual units. I repeat, therefore, if the rates which are adopted are right, then application of those rates to the cost of acquisition of the assets comprising the group will verify the amount by which those assets will deteriorate.

Another fallacy which appears to have made its appearance here is to regard depreciation as a method of valuation. It is not that at all. As I have already stated, depreciation itself is the impairment of an asset during its existence, which may be offset by a process of accounting allocation.

It is wrong also to think that the amount by which the acquired cost of assets exceeds their exchange value or even the proceeds obtained upon realization otherwise than at the end of their existence will necessarily be the quantum of depreciation. Factors other than depreciation cause the exchange value or yield upon sale to fluctuate greatly. A decrease or increase in the purchasing power of money, changes in the relative importance of demand as compared with supply, and exaggerated losses or gains in the sale of assets otherwise than in the normal course are some of the causes mentioned in the evidence which influence exchange values. The illustration cited by Judge Macdonell on the top of p. 66 of the evidence is useful on this point. Undoubtedly a car bought in 1939 was capable of being sold in 1945

for something in excess of the 1939 purchase-price, and yet it could not be argued that the vehicle had suffered no depreciation. That happy experience would be achieved by several intervening circumstances. Accordingly, it is my opinion that the learned judge erred when he came to the conclusion that "real" depreciation could be discovered because of events which occurred after the period covered by the accounts.

If one accepts, as I do, the theory that depreciation is the loss sustained by a capital asset during its serviceable existence due to wear and tear, decay, inadequacy and obsolescence and that provision is ordinarily made for such loss in business practice by the adoption of one of several methods of allocation, then the questions to be decided here are whether the executors and trustees of this estate were right in taking depreciation into consideration when computing the amount of income earned by the estate each year, and, if so, whether the amounts set aside by them were fair and reasonable. I am satisfied that both of those questions are to be answered in the affirmative.

In the first place let me say that there does not appear to be any good reason for suggesting that executors who are directed to carry on the business of a deceased may not allocate proper amounts for depreciation in computing the annual income from the business. In his lifetime the wise testator does so and I believe his policy should be followed by his executors. Ample authority for that view is to be found in the judgments in *Re Crabtree*; *Thomas v. Crabtree* (1912), 106 L.T. 49, and *Re Rose's Will*, 14 M.P.R. 223, [1940] 1 D.L.R. 139. In the former case there was a direction to the trustees to continue the testator's business and to pay "the profits arising from my business" to his widow during her life. In pursuance of their duties the trustees deducted from profits not only the cost of repairs to the machinery but also an annual sum for depreciation at the rate of $7\frac{1}{2}$ per cent. on its original value. It was held by Swinfen Eady J. and by the Court of Appeal that they had taken the proper course. Two of the judges in appeal expressly approved of certain language used by the judge of first instance, and I believe it is well worth quoting here, though all the judgments are most pertinent. The passage to which I refer is as follows:

"But in the ordinary course of ascertaining the profits of a business where there is power machinery and trade machinery

which is necessary in order to perform the work of the business, it is, in my opinion, essential that, in addition to all sums actually expended in repairing the machinery, or in renewing parts, that there should be also written off a proper sum for depreciation, and that sum ought to be written off before you can arrive at the net profits of the business, or at the profits of the business; and it is not profit until a proper sum, varying with the class of machinery, with the nature of the business, and the life of the machinery, has been written off for depreciation."

Re Rose's Will, supra, is a decision of Mr. Justice Harrison of the Supreme Court of New Brunswick. After the business formerly conducted by the deceased was sold on account of a loss it was held that the depreciation of the building and of the equipment used in the business was chargeable against the income from the business and not against capital. At p. 229 the learned judge says:

"In my opinion the business should be charged with depreciation on this building as a current expenditure payable out of income, because there is a consumption of capital to that extent which ought not to enter into profits.

"For the same reasons I consider that depreciation on 'the furniture and fixtures and delivery equipment' used in the business is a proper charge against the income of such business."

Those judgments express with clarity the opinion which I formed at an early stage in this matter, not only that the executors and trustees of this estate were permitted to charge depreciation to income but that it was incumbent upon them to do so in order to determine the net profits distributable under the will and Mr. Justice McTague's judgment.

Mr. Denison argued, however, that for the executors and trustees to make provision for depreciation was to contravene the terms of s. 1(3) of The Accumulations Act.* Substantially his submission was that the wide powers given by the will to the executors to determine what was net income disappeared when the effect of the Act intervened and that thereafter they were

*Section 1(3) of The Accumulations Act provides:

"Where an accumulation is directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed."

required to pay over all income to those entitled without any deduction for depreciation unless actual losses could be shown. Putting it another way, it was said that the allocations made for depreciation constituted accumulations in violation of the Act. The short answer to that is to be found in the will and in Mr. Justice McTague's judgment. By the latter "the surplus income" was diverted to the next-of-kin during the lifetime of the widow and that expression must have had its source in clause 16 of the will. Accordingly, that which was the subject matter of the judgment was not the income of the estate as such but the "surplus income" as those words are used in the will and when that document is examined it becomes abundantly clear that the testator did not mean to include the entire earnings of the newspaper business when describing the income which would supply "the surplus income" but only "the net annual income properly divisible as profits". I can only conclude therefore that further accumulations for depreciation were not encompassed by the judgment as they were deductible before "the surplus income" was ascertained. Reference was made to *Re Fulford* (1926), 59 O.L.R. 440. Mr. Justice Middleton there indicates that a will is not altogether displaced by the Act but primarily is to be read and construed as though it did not contain the direction to accumulate beyond the statutory period. No significance attaches to the fact that those who are served by the application of the Act in this matter were not beneficiaries under the late Mr. Robertson's will.

The cases of *Berry v. Geen et al.*, [1938] A.C. 575 and *Vine v. Raleigh*, [1891] 2 Ch. 13, were also cited by counsel for the life tenants, but it seems to me that the reasoning contained in those judgments supports the conclusion that where a testator directs his executors to carry on his business, he intends that they should make all usual and proper charges before arriving at the amount of net income derived from the business, and that charges so made and withheld from income do not contravene The Accumulations Act.

An alternative argument was then presented. It was said that although *Re Crabtree*, *supra*, did fortify the conclusion that depreciation in respect of machinery could be debited against gross revenue, yet with the exception of the judgment in *Re Rose's Will*, *supra*, the Courts have steadfastly turned

against the idea of charging the income with depreciation upon buildings unless there is express permission to that effect in the will, and, since there is none here, the life tenants ought not to be burdened with that portion of the charge. Mr. Mason mentioned certain American authorities including 31 Corpus Juris Secundum, 1942, p. 65; Scott on Trusts, 1939, p. 1342 (vol. 2); *Laflin v. Commissioner of Internal Revenue* (1934), 69 Fed. 2d 460; *Dixon v. Commissioner of Internal Revenue* (1934), 69 F. 2d 461; and *In re Matthews' Estate; Milwaukee Protestant Home for the Aged et al. v. First Wisconsin Trust Co. et al.* (1932), 245 N.W. 122, all of which refer to "the Pennsylvania rule" that extraordinary dividends or proceeds upon a sale are apportionable, and to the extent to which they represent earnings accruing during the period of the trust they are allocatable to income, and so far as they do not they are assigned to principal. It should be mentioned at once, however, that what is known as "the Massachusetts rule" prescribes that extraordinary dividends are wholly principal; cf. Scott, *op. cit.*, pp. 1259, 1316, 1342-4. Thus it will be seen that there is no unanimity of opinion on the point south of our border.

In an argument somewhat paralleling that which I have just discussed, Mr. Denison contended that the life tenants, not being liable for permissive waste, were not chargeable for any depreciation in respect of the buildings. The cases of *In re Hotchkys; Freke v. Calmady* (1886), 32 Ch. D. 408; *In re Cartwright; Avis v. Newman* (1889), 41 Ch. D. 532; *Patterson v. The Central Canada Loan and Savings Company* (1898), 29 O.R. 134; *Monro v. The Toronto Railway Company et al.* (1904), 9 O.L.R. 299 and *Currie v. Currie* (1910), 20 O.L.R. 375, all substantiate the proposition that unless there is an express duty to repair, a legal tenant for life of land is not liable for permissive waste. Mr. Denison submits that while the executors and trustees of this estate were required to repair generally, they had no right to throw the load of those repairs upon the life tenants.

This will prevents the application of either of those two rules. Clause 15 contains unequivocal instructions to the executors and trustees to carry on the newspaper business, and I cannot avoid the conclusion that implicit in that direction was authority to charge repairs and depreciation in the same way and to the same extent as in any other commercial enterprise. While deprecia-

tion upon buildings may not be allocated against income in certain American States, and while the burden of permissive waste is not ordinarily cast upon a tenant for life, it is my view that such is not the case in any instance where the testator has directed his executors to carry on his business and depreciation and repairs are rightly incurred in the conduct of that business. The decision in the *Rose* case, *supra*, is authority for that statement. Mr. Denison sought to meet it by suggesting that so far as his client was concerned, The Accumulations Act supplanted entirely the clause in this will directing that the business was to be continued. With respect, all I can say is that such a conclusion would result in an unnatural and wholly unauthorized extension of the Act.

The second and more difficult question involves the contention advanced by the respondents that the executors and trustees were so generous in their provision for depreciation prior to 31st May 1939 that no further allocations were necessary, and in this they have a favourable finding by Judge Macdonell. I propose now to consider that conclusion in the light of the evidence and exhibits, to show why I disagree with it.

Whether the sums actually allocated to depreciation are proper is a matter of evidence. In *Glasier v. Rolls* (1889), 42 Ch. D. 436, Mr. Justice Kekewich said at p. 453: "There is no occasion to specify what outgoings are properly chargeable, for although the question sometimes occurs the principle of solution is easy and well understood. Ought a deduction to be made for depreciation? There are two good reasons for an affirmative answer. First, Profits must be deemed to be calculated as a prudent man of business would calculate them, that is, after making a fair allowance for depreciation. Secondly, Apart from more prudential reasons an allowance is necessary, because with wasting property there is a constant consumption of capital and that ought not to enter into profits. The proper deduction is of course in each case a question of evidence."

Mr. McDonald testified that he had obtained information from the United States which showed that the composite estimated useful life of plant and equipment of printing and publishing establishments, which would include the newspaper industry, is approximately 17 years, which life-span represents a rate of depreciation of 5.88 per cent. per annum. He also swore that the

normal rates allowed on cost values of assets by the Income Tax Division of the Federal Department of National Revenue are 10 per cent. per annum on machinery and $2\frac{1}{2}$ per cent. per annum on buildings, and while these figures were established for another purpose they are entitled to considerable weight. What the executors and trustees did after 1929 was to provide annually for depreciation on plant and equipment at a rate of $7\frac{1}{2}$ per cent. and on buildings at a rate of $2\frac{1}{2}$ per cent. Those rates were applied to the gross book values of the assets at the close of the accounting period. Prior to 1931 those book values may have reflected the acquisition of assets at cost and the disposal of some of those assets. In the period from 1931 to 1935 effect was given to two appraisals and another accounting adjustment which had been made, with the result that as of 1st January 1935 there was a net decrease in the gross book value of assets of \$823,874.68. Thereafter the same rates of depreciation were applied to the reduced book values after additions and subtractions were made for acquisitions and retirements, and while the reason for the figure of \$792,530.98 shown as reserve on 31st May 1939 has not emerged, it was demonstrated that during the period from that date to the death of the widow the executors and trustees charged depreciation at the above rates only upon the written-down value of assets. As I have already said, the amount established on that date for accumulated depreciation is of no concern to the life tenants so long as the rates used thereafter were fair and reasonable. The fact is that by continuing to apply the same rates after 1935 the amounts set aside for depreciation following 1939 were less than those set aside at any time after 1929. If there were evidence to suggest that during the last period the rate of $7\frac{1}{2}$ per cent. with respect to plant and equipment was applied to gross cost of acquisition there would be good reason to complain in view of the evidence that the rate to be used in such circumstances should be 5.88 per cent. I repeat, however, that such a practice was not followed. What was done received approval from Mr. McDonald, for he said that the course taken by the executors and trustees was quite permissible from an accounting point of view and in his opinion resulted in "a very reasonable estimate of the depreciation". It is probably impossible to ascertain exactly what proportion the sums charged for depreciation bore to the cost of

acquisition, but fortunate guidance is furnished by depreciation allowances made by the Income Tax Department. In or around the year 1940 its officials conducted what would appear to have been a comprehensive investigation of the books and records of the business and appraised its assets upon an acquired cost basis. Mr. McDonald stated that, being familiar with methods of the department, he would say that those officials were very careful when they reviewed the books and that he would be satisfied that their figures would be "pretty accurate". If they are, then the amounts allocated by the executors and trustees for depreciation represent approximately 5.4 per cent of acquired cost values on plant and machinery and 1.6 per cent. on buildings. Mr. McDonald also said that those rates were less than the rates used in similar businesses and it is obvious that such is the case with respect to buildings and must equally be so if the plant and equipment are to be regarded as having a normal life expectancy of 17 years. The foregoing facts were not seriously disputed and, as far as I am concerned, are such as to produce the almost irresistible conclusion that the executors and trustees faithfully discharged the duty resting upon them to preserve an even hand between the Hospital and those entitled to the income in the period under discussion. Those facts establish to my satisfaction that the deductions for depreciation made by the executors and trustees in the period were just and proper.

Mr. Mason, calling upon his ability to analyze statements and figures, sought to show by the accounts and exhibits that the reserves for depreciation were excessive and unreasonable, but I am far from being convinced that such is the case. For example, I do not agree with his explanation of the origin of the figure of \$792,530.98 which was set up as the accumulated reserve as of 31st May 1939. His conjecture as to the arrangement of valuations which brought forth the sum of \$792,953.14 is open to serious doubt and his deduction that it furnishes the source of the sum transferred to the depreciation reserve account on 31st May 1939 ignores the fact that the executors and trustees did add annual sums to the aggregate of the allocations for depreciation in the intervening period from 1934 to 1939. Then Mr. Mason tries to find some comfort in the fact that the figure of \$792,530.98 was set up as the accumulated reserve at the commencement of the period in question. He suggests with

some justification that the executors and trustees must have decided that the last-mentioned amount truly represented the proper total of depreciation accumulations at that date, and if so, he would have me infer that in the years from 1917 to 1939 the average annual charge for depreciation was \$37,755, whereas in the period from 1939 to the date of death of the widow the annual average allocation was about \$90,000. If this reasoning were correct, then naturally the executors and trustees would be invited to explain their apparent decision to advance the rates suddenly, but plainly the inference counsel asks me to draw is not open simply because the figure \$792,530.98 is not the total of all accumulations up to 1939. I say that because it would appear that in 1934 much, if not all, of the existing reserve for depreciation was absorbed by the appraisals which I have mentioned. As Mr. McDonald testified, the aggregate of the allocations in the years before 1939 was approximately \$1,800,000 and not \$792,530.98, so that the average annual charge from 1929 on was consistently about \$90,000.

Then Mr. Mason directed my attention to the records which appear to show that on 11th July 1947 the book value of the assets, after taking depreciation into account, was \$523,368.47, whereas an appraisal made as of 31st January 1948 (ex. 5) indicates that the "present value" of the assets being examined, "based upon the cost of replacing the same now, less depreciation", is \$2,894,960.19. It is said that this demonstrates that the executors and trustees had previously depreciated the assets by too great an amount. I fail to apprehend that argument. Book values originating with an appraisal made in March 1935, when, as Mr. McDonald stated, the depression had set in, are not to be compared with replacement values in 1948, when inflation flourished. Certainly I could not be persuaded that any part or the discrepancy between the two totals was due to an over-charge of depreciation.

Mr. Mason next examined certain figures included in exhibits 9 and 10 pertaining to two large printing machines in an effort to show that there had been excessive depreciation charged with respect to those assets. In appraisals made in 1942 and 1948 those machines, which were purchased at various times between 1929 and 1934, were recorded as possessing a "condition factor" of 70 per cent. in both those years. Whatever "condition

factor", as that term is used in those appraisals, was designed to include, the fact that these machines were deemed to enjoy as high a condition factor in 1948 as in 1942, after years of daily service, proves beyond peradventure that a condition factor is something quite different from depreciation. That is so obvious that it hardly requires attention. But Mr. Mason suggested that a total depreciation of 142.5 per cent. (being the aggregate of annual allocations for 19 years at $7\frac{1}{2}$ per cent. per annum) upon machines which are still operating and are said to have an observable physical condition of 70 per cent., is entirely abnormal and unreasonable. I would not care to make that deduction. In the first place, this particular equipment may very well have a longer useful period of service than other assets to which the same rate is applied. Furthermore, from and after 1st January 1934 the rate of depreciation was not $7\frac{1}{2}$ per cent. of acquired cost, but $7\frac{1}{2}$ per cent. of appraised value calculated when deflation was rampant. If the income tax assessments are sound, and if the rate of 5.4 per cent. which results from those assessments can be used with respect to these specific machines, they were only depreciated by approximately 99.9 per cent. in the period between 31st May 1929 and January 1948. That does not strike me as being out of the way, especially as any provision for their depreciation ought to embrace some allowance for obsolescence.

Mr. Mason also urged that the figures to be found in the various exhibits gave indication that the maintenance of the machinery was on such a high scale as to render unnecessary any deductions for depreciation in the period between 1939 and 1948. That the executors and trustees pursued a careful course with respect to maintenance is undoubtedly true, particularly as they were faced with known shortages following the outbreak of war. I have no doubt, too, that the opinion that machinery in printing and publishing businesses generally has a life expectancy of 17 years must have been based upon the hypothesis that those assets would be properly preserved while in use. But the adoption of an intelligent maintenance programme does not obviate the desirability of providing for depreciation. As was said in one of the definitions included in ex. 8, the latter "is always closely related to a maintenance policy that is assumed to be in force in respect of the property to which it relates",

but the one should not be treated as an eligible substitute for the other. That was made plain in *Re Crabtree, supra*, by Swinfen Eady J., who, in discussing a similar submission, remarked at p. 50: "It is not enough to say that the machines and plant have been properly repaired and properly renewed from time to time." He appreciated, of course, that, because of the occurrence of obsolescence, no amount of repairs will thwart the ultimate retirement of an asset which is capable of becoming obsolete.

It was also argued that in certain periods such as that which followed 31st May 1939 the need for depreciation allocations may be counterbalanced by other circumstances. I confess that I do not fully understand that contention. If it means that deductions for depreciation may be avoided because the exchange value of the asset appears to be greater due to a fluctuation in the value of money, then it is wrong, for there has been no increase in the basic worth of the asset and in any event that is not a factor which relates in any way to the question whether provision should be made for depreciation. If, on the other hand, and as was hinted, the statement is to be taken as suggesting that the replacement value of the unit has risen because of extraneous circumstances, such as the relationship of supply to demand, and that in view of such enhanced value depreciation allocations may be suspended, temporarily at least, it is equally unsound, for that improvement is a capital gain.

Judge Macdonell took the position that the assets had been fully depreciated by 1939 as a result of excessive allowances prior to that date. In his reasons the learned judge says: "Adjustments were made in book value and the reserve carried for depreciation as a result of appraisals made from time to time. These adjustments indicate that too much had been allowed for depreciation." I do not understand that reasoning. There is certainly no basis for thinking that the adjustments made between 1931 and 1935 pointed to inordinate allowances. The only major adjustment was caused by an appraisal conducted in the depth of the depression and, as one would expect, the reduced values thereby disclosed were a reflection not only of the deterioration of the assets, but also of the fact that the country was then in a sad state economically. Mr. McDonald would not say that the "write-down" at the end of 1934 was caused by

depreciation of the particular assets rather than by the depression of values generally. The only other adjustment which was made was that which brought into the "Reserves-Depreciation" account the sum of \$792,530.98. As no one can now explain the derivation of that figure, and as it exceeds the amount with which the account ought to have been opened, that particular adjustment can scarcely be regarded as an admission that the subsequent allocations were too great. The learned judge could not have had in mind the appraisals obtained in 1942 and 1948 because no adjustments were made because of those later appraisals. Accordingly, I can find no basis for the statement that "These adjustments indicate that too much had been allowed for depreciation."

Nor do I subscribe to the view that the process of depreciating assets at $7\frac{1}{2}$ per cent. for 29 years, so that the arithmetical aggregate of depreciation appears to be $2\frac{1}{4}$ times greater than the original book value of the assets, furnishes further proof that the executors and trustees were intemperate in settling depreciation allowances. Such reasoning overlooks two things. First, depreciation was computed on the appraisal values from and after 1st January 1935, so that it is not right to multiply 29 years by $7\frac{1}{2}$. Secondly, the evidence establishes that there were substantial retirements in the decade from 1925 to 1935 and ex. 10 shows that there were replacements or additions of consequence in that period. Where the assets are changed from time to time it is idle to draw attention to the fact that if assets are depreciated at a rate of $7\frac{1}{2}$ per cent. annually they will be fully depreciated in 13.33 years; such may be the actual result and should be if the rate is sound. I am convinced that where the assets vary from time to time the most important thing to do is to be sure that a proper rate is applied.

The learned judge also regarded the ultimate sale of the business as an indication that after 1939 there was no need to add to the depreciation fund. It should be pointed out at once that the amount realized upon a sale of the assets, except as salvage, should not govern the policy adopted with respect to depreciation. In *Re Crabtree, supra*, Buckley L.J. commented upon that theory at p. 51 in this way: "One of the witnesses in his affidavit referred to the 'saleable value' of this machinery. That is not the right standard. Here it is the value of the ma-

chinery for the purpose of this business, not the saleable value." That the proceeds upon disposal in the ordinary course do not furnish a reliable test as to the propriety of the allowances set apart for depreciation is obvious when one considers the many other circumstances which affect the amount obtainable on sale. The state of the market and, once again, the value of money will have a profound influence upon the transaction and will, in my view, render abortive any attempt to relate the result to the course previously followed in settling the rates of depreciation. How frustrating a task it is can be seen by the difficulties encountered by Judge Macdonell when he sought to show that the amount recovered on the sale gave support to his conclusion that there was no need for depreciation charges during the period in question. With respect, it seems to me that many of his calculations were of a rather speculative character and gave no assistance in the solution of the problem before him. For example, his method of estimating the value of the goodwill and the franchise enjoyed by the paper is highly questionable and indeed it is plain that one mistake was made, for the 1947 book value of goodwill was related to the newspaper circulation of 1917.

In this connection I was referred to a decision of the English Court of Appeal in *In re Bridgewater Navigation Company*, [1891] 2 Ch. 317, but it is not applicable to the circumstances of this matter. That case stands for the principle that if there is authorization to make deductions from profits for a specific purpose, and the purpose never accrues, then the fund carrying the accumulation of such deductions is divisible among those otherwise entitled to receive the profits. It was held that the onus to show that there had been no necessity to resort to the fund established for depreciation rested upon those who claimed the moneys as profits, and that there had been such proof in that case since no restoration of capital had ever been required. In this matter it is manifest that provision for depreciation was essential as the practice of retiring and replacing assets was in force from time to time. It is also to be noted that in the *Bridgewater* case the reserve funds were specifically "set apart out of profits" and that they were always regarded by those in charge of the company's affairs as "undrawn profits". The same is not true here. It is not without interest that two

of the counsel engaged in the appeal in that case were later members of the Court of Appeal which heard *Re Crabtree, supra*. Had they thought that the earlier decision enunciated a principle which might be deemed to be in conflict with that which was expressed in *Re Crabtree*, those judges would surely have made some reference to that case.

Before leaving the matter of quantum, I cannot resist the temptation of pointing to the fact that while the judgment below declares that no depreciation should have been charged in the years following 1939, the reasons for judgment are utterly silent as to why such disallowance applies to depreciation upon the buildings. When the evidence was being adduced the learned judge remarked that a rate of $2\frac{1}{2}$ per cent. for depreciation of buildings was usual. Here the rate used throughout was somewhat less than that, and it is therefore strange that it was not allowed.

If I were otherwise able to agree with the reasons for judgment, I would have to give different effect to them, for I can see no justification for loading all depreciation upon those entitled to income in any particular period. If, as has been held, the assets which were in existence on the 31st May 1939 had been fully depreciated by that date, and if it was also true that those assets served without retirement and replacement (which to me is inconceivable but which is implicit in the Surrogate Court judgment), then the total of the depreciation set apart should, in my opinion, be allocated to all years in the whole period from the date of death of the testator to the date of death of his widow, so that all who were entitled to income would be made to contribute equally to that total. I see no reason for imposing the entire allowance upon any particular period during the life of the assets. Judge Macdonell does not hold that these assets did not depreciate during the period from 31st May 1939 to 11th July 1947; it would be quite impossible to suggest that, and if this is so, it is equally difficult to see why that period should not be responsible for its proportionate share of the entire amount of depreciation for, after all, depreciation should be distributed over the useful life of the unit, not over certain segments of that life. However, it is unnecessary to enter upon calculations to give effect to this reasoning of mine

because I find that there had not been excessive or even sufficient reserves set apart by 31st May 1939.

If anything further were needed to bolster my conclusion in this branch of the argument, it is the evidence of Mr. McDonald that as of 11th July 1947 the accumulated reserve for plant and equipment as shown by the Income Tax Department figures was approximately 98.7 per cent. of the acquired cost values as determined by the Department and similarly the reserve for buildings was about 38.8 per cent. of their acquired cost findings. Until the reserve for depreciation exceeds 100 per cent. of the acquired cost value, there is no occasion to apportion the amount of the depreciation over the extended life of the assets as suggested above.

To sum up, I am of the opinion that the executors and trustees were obliged to make due provision for depreciation during the entire period in which they operated the business and that the deductions made by them for that purpose after 31st May 1939 were fair and reasonable and were not redundant because of the reserves they had set aside prior to that date.

That being my view, I do not propose to discuss the cross-appeal.

With the exception of the Queen Elizabeth Hospital, the Infants' Home and Infirmary and the Grand Lodge, A. F. & A. M., which are to divide one set of costs, all parties are to have their costs of the appeal and cross-appeal out of the balance of the residuary estate forthwith after taxation.

Appeal allowed.

Solicitors for the appointed trustees, appellants: Blake, Anglin, Osler & Cassels, Toronto.

Solicitors for the executors of Jessie Elizabeth Cameron, cross-appellants: Bicknell, Cameron & Chisholm, Toronto.

Solicitors for the surviving executrix of Irving Earle Robertson, cross-appellant: Holmested, Sutton, Hill & Kemp, Toronto.

Solicitor for the executrix of John Sinclair Robertson, cross-appellant: D. M. Heddle, Oakville.

Solicitors for the executors and trustees of the estate: McMaster, Montgomery, Steele, Willoughby, McKinnon & MacKenzie, Toronto.

Solicitors for the Grand Lodge, A. F. & A. M.: Kilmer, Rumball, Gordon, Beatty & Dean, Toronto.

Solicitors for The Infants Home and Infirmary: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

Solicitors for the Queen Elizabeth Hospital: Clark, Gray, Baird & Cawthorne, Toronto.

[MCRUER C.J.H.C.]

**Toronto-St. Catharines Transport Limited v. The City of Toronto
and Canadian National Railway Company.**

Railways—Subways in Municipalities—Duties of Railway and Municipality respectively—Clearance—Floor Level Raised by Municipality—Whether Cause of Action Exists under Act—Limitation—The Railway Act, R.S.C. 1927, c. 170, ss. 39, 263, 264, 391, 392.

Municipal Corporations—Limitation of Actions—The Municipal Act, R.S.O. 1937, c. 266, ss. 480, 481—Inapplicability to Action not Based on Nuisance or on Breach of Duty under s. 480.

Where an order is made by the Board, under s. 39 of the Dominion Railway Act, for the construction of a subway under railway tracks in a municipality, and the order requires the municipality to maintain necessary pavement, the effect of ss. 263 and 264 of the Act is to impose on the municipality a duty to do nothing that will reduce the overhead clearance at the centre of the subway below 14 feet. If the municipality fails in this duty a person injured in consequence of the breach of duty will have a right of action against it, notwithstanding the provision of penalties by s. 392 of the Act. *Phillips v. Britannia Hygienic Laundry Company, Limited*, [1923] 2 K.B. 832 at 842, applied; other authorities discussed. Such an action, being based neither on nuisance in respect of a highway nor on a breach of the duty imposed by s. 480(1) of The Municipal Act, is not subject to the three months' limitation period prescribed by s. 480(2), but may be brought at any time within the two years provided in s. 391 of The Railway Act.

A railway company which, having built a subway in compliance with an order of the Board, and with the clearance provided by law, does nothing thereafter to reduce the clearance, will not be liable if the clearance is reduced by the action of the municipality. *Canadian National Railways v. Guérard*, [1943] S.C.R. 152, applied. The highway under the subway is vested in the municipality and the railway company has no right, either at common law or by statute, to make any alteration in its level after the construction of the subway is completed.

AN ACTION for damages.

29th November 1950. The action was tried by MCRUER C.J.H.C. without a jury at Toronto.

B. J. Thomson, for the plaintiff.

A. P. G. Joy, for the City of Toronto, defendant.

A. D. McDonald, K.C., for the defendant company.

30th March 1951. MCRUER C.J.H.C.:—This action is brought to recover damages sustained by reason of a low pressure fire-

box type heating boiler which was being transported by the plaintiff on a tractor-trailer, coming in contact with the ceiling of a subway providing a passageway for Parkside Drive, a street owned by the Corporation of the City of Toronto (to which I shall hereinafter refer as "the defendant corporation"), under the railway tracks of the Canadian National Railway Company (to which I shall hereinafter refer as "the defendant railway company").

The facts are simple: The subway in question was constructed pursuant to an order of the Board of Railway Commissioners for Canada (to which I shall hereinafter refer as "the Board") dated the 8th December 1909, made under the provisions of ss. 59 (as re-enacted by 1909, c. 32, s. 5) and 238 of The Railway Act, R.S.C. 1906, c. 37, now R.S.C. 1927, c. 170, ss. 39 and 257, according to a plan filed with the Board, as amended by the Board's order. The construction was done by the predecessor of the defendant railway company, a contribution to the cost being made under the order of the Board by the defendant corporation as specified in the order. The order provided that the railway company "shall, at its own expense, maintain the abutments and girders necessary to carry its tracks; and the City shall, at its own expense, maintain all necessary sewers, pavements and sidewalks on the floor of the subway and the approaches thereto". In so far as it affects this case the order is to be viewed as an exercise of delegated legislative authority.

The relevant provisions of The Railway Act are:

Section 39:

"When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

"2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid."

Section 263: "Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet."

Section 264: "Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure."

Section 392: "Every company and every municipal or other corporation which neglects or refuses to obey any order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, shall for every such offence, be liable to a penalty of not less than twenty dollars nor more than five thousand dollars. . . .

"3. Wherever it is proved that any municipal or other corporation has neglected or refused to obey any order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, the mayor, warden, reeve, or other head of such corporation, and every member of the council or other ruling or executive body of such corporation, shall each be guilty of an offence for which he shall be liable to a penalty of not less than twenty dollars and not more than five thousand dollars, or imprisonment for any period not exceeding twelve months, or both, unless he proves that, according to his position and authority, he took all necessary and proper means in his power to obey and carry out, and to procure obedience to and carrying

out of, such order, and that he was not at fault for the neglect or refusal to obey the same."

"4. Nothing in or done under this section shall lessen or affect any other liability of such company, corporation or person, or prevent or prejudice the enforcement of such order in any other way.

"5. No prosecution shall be had under this section except by leave or direction of the Board."

The subway as originally constructed provided the required overhead clearance of 14 feet and the defendant railway company has since done nothing to reduce the clearance. However, the evidence shows that at the time of the accident the clearance at the north end of the subway was 14 feet and $\frac{1}{2}$ inch in the centre, while at the south end it was 13 feet 6 inches in the centre. After the construction of the subway the defendant corporation made repairs to the pavement which raised the floor, diminishing the overhead clearance.

The plaintiff's truck was proceeding from north to south and had passed safely through the northern approach when the top of the boiler being carried on the tractor-trailer caught on the ceiling of the structure, causing damage to the boiler and the truck. The amount of the damage is agreed to be \$2,035.

According to the evidence which I accept, the over-all height of the load was less than 14 feet. It was said to be 13 feet 5 inches. There may have been an error by an inch or two in the measurement but I am satisfied, and so find, that it was less than 14 feet. I specifically find that the damages were sustained by reason of the fact that there was not a clearance of 14 feet at the centre of the exit of the subway for vehicles passing from north to south.

While some argument was addressed to the Court in support of a plea of contributory negligence, I think there is no evidence that would justify a finding of contributory negligence on the part of the servant of the plaintiff. I think he was entitled to assume that the provisions of the statute as to overhead clearance would be complied with.

I prefer to deal first with the liability of the defendant railway company. In this case there are two factors to be considered: the highway passing under the subway is vested

in the defendant corporation and the defendant railway company had neither any common law nor statutory right to make alterations in the level of the highway after the construction of the subway was completed. I think the decision in *Canadian National Railways v. Guérard*, [1943] S.C.R. 152, [1943] 2 D.L.R. 65, 55 C.R.T.C. 183, which adopts the reasoning in *Attorney-General v. Great Northern Railway*, [1916] 2 A.C. 356, and approves of the decision of Street J. in *Carson v. Village of Weston et al.* (1901), 1 O.L.R. 15, is conclusive in favour of the defendant railway company. In that case Taschereau J. dissented, but he made it clear that he was basing his judgment on the fact that the defendant was the owner of the subway and the land over which it was built, and had therefore a legal right to prevent others from reducing the overhead clearance by raising the floor. The defendant railway company, having constructed a subway providing the clearance required by law, and maintained the girders and abutments as constructed according to the order of the Board, discharged its full legal duty to the plaintiff and others using the highway. I therefore dismiss the action against the defendant railway company, with costs.

The action against the defendant corporation presents more difficulty. Under the order of the Board this defendant was obligated "to maintain all necessary . . . pavements . . . on the floor of the subway and approaches thereto". Even if there were no such provisions in the order I think it would be the duty of the defendant corporation to do no act on the highway which it owned to reduce the overhead clearance at the centre below 14 feet. However, this provision of the order, taken together with ss. 263 and 264 of The Railway Act, must clearly mean that once the subway is constructed the City is bound to maintain the floor so that the clear headway of 14 feet at the centre will at all times be provided.

The defendant corporation pleads that the plaintiff's claim against it is barred by the provisions of s. 480 of The Municipal Act, R.S.O. 1937, c. 266 (now R.S.O. 1950, c. 243, s. 453).

As it is necessary to consider the precise language used by the Legislature, I quote the applicable subsections of ss. 480 and 481 (now 454) in full:

"480.—(1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction

over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

“(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.”

“481. The provisions of subsections 2 to 8 of section 480 shall apply to an action brought against a corporation for damages occasioned by the presence of any nuisance on a highway.”

This action was not commenced until after three months from the time when the damages were sustained.

Section 480(1) imposes a statutory duty on the corporation not existing at common law to keep highways in repair and “in case of default” imposes a liability for all damages sustained by any person by reason of “such default”, that is, the statutory right to recover damages is limited by the statutory duty imposed. This section was first introduced into the law of Upper Canada in 1850. Up until that time, generally speaking, there was no liability to individuals for neglect of duty to repair highways; but for misfeasance a wrongdoer was always liable to those injured: *Dick v. Township of Vaughan* (1917), 39 O.L.R. 187 at 194, 34 D.L.R. 577. Section 480(2) limits the right to bring an action for damages occasioned by “such default”, that is default in the performance of the statutory duty imposed under subs. 1, to the period of three months from the time when the damages were sustained. Therefore, if a right of action against the defendant corporation existed quite apart from subs. 1, that right of action is not subject to the limitations created by subs. 2.

The limiting provisions of s. 481 are broader in their application. The same period of limitation is provided in respect of actions founded on liability of the municipal corporation for nuisance on the highway. This section, unlike s. 480, does not purport to impose a liability but merely limits the time for bringing an action where the right of action arises at common law. In applying these limiting provisions I think the principle expressed in the words of Viscount Haldane in *Bradford Corporation v. Myers*, [1916] 1 A.C. 242 at 251, has particular signifi-

cance. In referring to the section of The Public Authorities Protection Act, 1893, cutting down the ordinary rights of the subject to his remedy as to time and costs he said:

"My Lords, in the case of such a restriction of ordinary rights, I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority."

It follows that if the plaintiff can maintain its action without resorting either to the rights created by s. 480(1) or to common law rights based on nuisance, it is entitled to succeed. I therefore consider the plaintiff's rights regardless of whether the condition of the pavement in the floor of the subway limiting the overhead clearance to less than 14 feet was non-repair within the meaning of s. 480 or a nuisance at common law, and it must be determined whether there was imposed on the defendant corporation a third liability created under The Railway Act and the order passed thereunder, arising out of a statutory duty to do no act to reduce the overhead clearance below 14 feet and whether, if there was such a duty, it vested a right of action in the plaintiff to recover damages sustained by reason of a breach thereof.

The cases where the plaintiff seeks to found liability on a breach of a statutory duty fall into three classes: (a) where the statute creates an obligation or duty and enforces its performance in the specified manner; (b) where a statute creates an obligation or duty and does not make special provision for its enforcement; (c) where the statute does not create an obligation but affirms an obligation at common law and gives a particular form of remedy. It is with (a) and (b) we are particularly concerned in this case.

The general rule applicable is laid down by Lord Tenterden in *Doe d. The Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847 at 859, 109 E.R. 1001. He says: "And where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

This, however, is but a general rule and is subject to many exceptions. There have been attempts to make a comprehensive statement applicable to the exceptions, such as: If the plaintiff

can show that he was one of a special class of the community for whose benefit the statute was passed, then it must be deemed to have given him a right of action when the breach has caused him injury. But such a definition is not all-inclusive. There are cases where the statutory duty is owed to individuals who are not of a special class and who may recover damages sustained by reason of the failure of the defendant to observe his statutory obligation.

Of all the cases that I have read I think the statement of Atkin L.J. in *Phillips v. Britannia Hygienic Laundry Company, Limited*, [1923] 2 K.B. 832, is the clearest and most comprehensive exposition of the law. At p. 842 he expresses the view that it has never been doubted that an obligation imposed upon railway companies by s. 47 of The Railways Clauses Consolidation Act, 1845, to erect gates at level crossings and to keep them closed at times required under the Act or regulations passed thereunder, although punishable by a penalty, conferred on a member of the public injured by default a right to recover damages. At p. 841 the learned Lord Justice states:

“Was it intended to make the duty one which was owed to the party aggrieved as well as to the State, or was it a public duty only? That depends on the construction of the Act and *the circumstances in which it was made and to which it relates*. One question to be considered is, Does the Act contain reference to a remedy for breach of it? Prima facie if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, and *Britannic Merthyr Coal Co. v. David*, [1910] A.C. 74. To my mind, and in this respect I differ from McCardie J., *the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual*. The duty may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot. *The right of action does not depend on whether a statutory com-*

mandment or prohibition is pronounced for the benefit of the public or for the benefit of a class. It may be conferred on any one who can bring himself within the benefit of the Act, including one who cannot be otherwise specified than as a person using the highway.” (The italics are mine.)

It is therefore necessary in each case to examine the precise nature of the statute and the circumstances to which it relates. One must “look at the general scope of the Act and the nature of the statutory duty; and in addition *one must look at the nature of the injuries likely to arise from a breach of that duty*, the amount of the penalty imposed for a breach of it, and the kind of person upon whom it is imposed, before one can come to a proper conclusion as to whether the Legislature intended the statutory remedy to be the only remedy for breach of the statutory duty”: per Vaughan Williams L.J. in *Groves v. Lord Wimborne*, *supra*, at p. 416. (The italics are mine.)

In *Wyant v. Welch*, [1942] O.R. 671 at 677, [1943] 1 D.L.R. 13, Gillanders J.A. uses language and follows cases using similar language that would be capable of a construction much narrower than the statement of the law I have quoted from the judgment of Atkin L.J. On a careful analysis of that case I do not think it discloses any intention to do other than to apply the principles laid down by Atkin L.J. At p. 677 Gillanders J.A. makes clear the basis of his judgment:

“I do not think it can be said that it was within the contemplation of the Legislature by the provisions of the relevant statutes, or of the county corporation in enacting the by-law, to do more than regulate the permitting of animals to run at large on the highway.”

Duff J. (as he then was) in *Orpen v. Roberts et al.*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, refers to “a class of the public” but I do not think there is anything in his judgment inconsistent with the judgment of Atkin L.J.

It is through an examination of the order of the Board and the relative sections of the statute here in question in the light of these authorities that the problem before me is to be solved.

It would appear to me that the scope and purpose of s. 263 of The Railway Act, in so far as the overhead railway crossings constructed after the 1st February 1904 are concerned, is to provide a convenient and safe width and height for the traffic

using the highway. Not all overhead crossings are required to be of this width and overhead clearance but those constructed after the 1st February 1904 are. Section 264 imposes a responsibility so to maintain the structure that has been constructed "as to afford safe and adequate facilities for all traffic passing . . . under or through such structure". The duty to maintain the pavement on the floor of the subway having been imposed on the defendant corporation under the order of the Board, it would appear to me that it has failed in its duty under both these sections. There was not a clear headway of 14 feet at the south end of the subway and there was no warning posted that the clear headway was less than 14 feet. The floor was therefore not maintained by the defendant corporation so as to afford safe and adequate facilities for all traffic passing under or through the structure. It was not sufficient for loads over 13 feet 6 inches in height but under 14 feet, and the servant of the plaintiff was lulled into a sense of security where in fact there was danger.

In order to determine whether this breach of duty confers on the plaintiff a right of action one must consider the penal provisions contained in s. 392 in conjunction with the order of the Board made under s. 39 and ss. 263 and 264. Penalties may be imposed not only on a municipal corporation but on the mayor, warden, reeve and other head of such corporation and on every member of the council. The penalties are heavy, including imprisonment up to twelve months, for neglecting to obey an order of the Board. A head of the corporation or a member of the council may be relieved of liability if it is proved that he took all means in his power to obey and carry out the order of the Board and he was not at fault for the neglect. These penal provisions are different in their nature from those contained in the ordinary public Act. No prosecution may be had under this section without leave of the Board. Even without the provisions of subs. 4 I think the penalties provided under subs. 3 are not to be considered as public remedies but rather as special remedies provided as a means of enforcement of the orders of the Board.

But subs. 4 would appear to dispose of any argument that is based on the submission that the penalties provided by this section were intended to exclude a remedy by civil action for damages sustained by reason of a breach of duty created by an order of the Board. To repeat, it states: "Nothing *in* or done

under this section shall lessen or affect any *other* liability of such . . . corporation . . . or prevent or prejudice the enforcement of such order in any other way." I think these words indicate an express intention of Parliament that the penal provisions in the section should not relieve a municipal corporation from liability where injury is sustained for breach of duty created under the Act. This construction does nothing more than put municipal corporations in the same position as railways are placed in by reason of s. 385 of The Railway Act, which provides that in addition to the liability for any penalty for omission to do acts required to be done under the Act or the Board's order the railway company shall be liable to any person injured for damages by reason of such omission. The result is that in so far as this case is concerned the defendant railway and the defendant corporation are put in the same position with respect to liability sustained by reason of any breach of duty imposed under the Act or by the order of the Board made thereunder and the penal provisions of s. 392 are not to be taken to lessen or affect the right of one injured by a failure of the defendant corporation to maintain the pavement on the floor of the subway as required by the order of the Board. To hold otherwise would have the effect of imposing liability on a railway company in such a case as this if it lowered the ceiling of the subway, while no liability would be imposed under the Act on a municipal corporation for raising the floor.

I therefore conclude that the failure of the defendant corporation to maintain the pavement in the floor of the subway so as not to reduce the overhead clearance below 14 feet in the centre and the resultant injuries to the plaintiff vested in it a right of action based on the failure of the corporation to discharge its statutory duty, just as the failure of the railway company to provide a proper gradient at a level crossing was found to give a cause of action where resultant damages were sustained in *Raspberry v. Canadian National Railway Co.*, 62 O.L.R. 408, [1928] 3 D.L.R. 831, 34 C.R.C. 402.

It therefore follows, if I am correct in this conclusion, that the plaintiff does not have to resort to the statutory liability imposed on the defendant corporation under s. 480 of The Municipal Act, or to the common law liability for maintaining a nuisance, for its remedy, and the limiting provisions of s. 480(2)

have no application to a right of action based on the breach of duty under The Railway Act. To such a right of action the limitation of two years imposed under s. 391 of that Act is the one applicable.

Judgment will therefore go for the plaintiff against the defendant corporation for \$2,035, together with costs of this action. I see no reason in the circumstances for making an order that the costs which the plaintiff is called upon to pay by reason of having joined the defendant railway company should be visited on the defendant corporation.

Judgment accordingly.

Solicitors for the plaintiff: Haines & Haines, Toronto.

Solicitor for the defendant company: A. D. McDonald, Toronto.

Solicitor for the defendant City: W. G. Angus, Toronto.

[GALE J.]

Pearson v. Pearson and Menard.

Divorce—Jurisdiction—Domicile—Change of Domicile after Institution of Action.

Jurisdiction in an action for divorce is to be determined at the time of the institution of the action, and if the Ontario Court has jurisdiction when the action is commenced that jurisdiction is not ousted by a change of domicile during the course of the proceedings. *Goulder v. Goulder*, [1892] P. 240, applied. Where, therefore, a husband, while domiciled in Ontario, brought an action there for divorce, but after the granting of judgment nisi he abandoned that domicile and acquired a new domicile in Sweden, *held*, the Court had jurisdiction to grant judgment absolute. *Balfour v. Balfour*, [1922-23] W.L.D. 133, agreed with.

A MOTION for judgment absolute, in an action by a husband for divorce.

11th April 1951. The motion was heard by GALE J. in Weekly Court at Toronto.

G. M. Paulin, for the plaintiff, applicant.

11th April 1951. GALE J. (orally):—This is a motion for decree absolute under the former Rules of Practice. The action for dissolution of marriage was instituted by the plaintiff husband who, though first possessing a domicile of origin in Sweden, acquired subsequently and prior to the institution of the action a domicile of choice in Ontario. Accordingly Mr. Justice

Urquhart came to the conclusion that this Court had jurisdiction to entertain the action, for on the 1st May 1939 a decree nisi was granted.

The evidence discloses that following the granting of the decree nisi the plaintiff, believing that he was suffering from an incurable disease, returned to Sweden for the purpose of being "at home" and being treated by his family physician. The evidence is irresistible that when he returned to Sweden he had full intention of remaining there for the rest of his days and accordingly that he was then abandoning his domicile of choice. By reason of many circumstances which I do not need to outline here, the application for decree absolute was delayed. I am of the opinion, however, that the delay has been satisfactorily explained.

The neat point that arises, therefore, is whether this Court, in an action for divorce commenced in Ontario when the husband is domiciled in Ontario, can grant a decree absolute after the husband has reverted to his domicile of origin elsewhere.

The case of *Goulder v. Goulder*, [1892] P. 240, appears to be authority for the assumption of such jurisdiction. There the facts as to domicile were complicated but the principle relevant to the problem is stated in the judgment of Lord Justice Lopes at p. 243 as follows:

"The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England *at the commencement of such proceedings*, and this, independently of the residence of the parties, the allegiance of the parties, the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the matrimonial offence or offences have been committed. I have come to the conclusion that the petitioner and respondent *at the time of the commencement of the divorce proceedings in this case (viz. 1889)*, were domiciled in England, and that, therefore, this Court has power to dissolve the marriage."

I cannot believe that the inclusion on two occasions of the words which I have italicized was casual. That judgment would, therefore, seem to provide clear support for the proposition that if the Court has jurisdiction when the action commences, that jurisdiction is not ousted by a change of domicile during the course of the proceedings. Confirmation for that view is also

to be found in a case in the Supreme Court of the Union of South Africa. The case is *Balfour v. Balfour*, [1922-23] W.L.D. 133. There the domicile of the husband plaintiff was changed after the action was instituted from South Africa to Lourenço Marques, and the decision is, therefore, particularly pertinent. In coming to the conclusion that the Court might still entertain the proceedings, Mr. Justice Stratford had this to say:

"When the respondent instituted an action in 1919, he alleged that he was domiciled in the Transvaal. Since then he says that he has abandoned his domicile and acquired a new domicile in Portuguese territory. From the facts set out by the respondent this appears to be so, but it is not necessary for me to decide this, because I am of the opinion that proper proceedings duly instituted in the forum of the parties' domicile at the time may be continued although there has been a subsequent change of domicile. Domicile must be established at the time proceedings are initiated and once this is established the Court has jurisdiction to deal with the matter until the final end and determination thereof."

Judgment absolute may issue.

Judgment absolute granted.

Solicitor for the plaintiff: George Mitchell, Kirkland Lake.

[COURT OF APPEAL.]

Ramsden v. Nunziato.

Contracts—Note or Memorandum in Writing—Subsequent Oral Arrangement—Specific Performance—Whether Oral Arrangement Constitutes Variation of Written Contract.

The defendant gave to the plaintiff an option to purchase lands owned by the defendant, the balance (after the deposit and the payment on closing) of the purchase-price "to be paid in full in two years, or sooner, with interest on the unpaid balance . . . the Vendor to release any Lots from the Mortgage on payment of the value of same". In the plaintiff's written acceptance there appeared the words: "the remainder of Purchase Price . . . to be arranged by a Mortgage at 5% interest per annum on unpaid principle [*sic*]", with the further words, later in the document: "The whole of the principle [*sic*] to be due and payable in 2 years." Two days after the acceptance the defendant requested, and the plaintiff agreed, that the whole balance should be paid in cash. The plaintiff now sought specific performance of the agreement, expressing his willingness to pay all cash.

Held, the plaintiff could not succeed under the rule stated as follows in Williams on Vendor and Purchaser, 4th ed. 1936, p. 5: ". . . if a stipulation, which is to the detriment or for the benefit of one of the parties exclusively, is omitted from the memorandum, that party

may submit to perform it or waive the benefits of it (as the case may require), and may with such submission or waiver specifically enforce the contract as stated in the memorandum." The oral arrangement here in question was certainly not for the exclusive benefit of the plaintiff, nor was he seeking to waive it. Under the authorities, the plaintiff was not entitled, even in equity, to take the position he had adopted here.

Held, however, the plaintiff was entitled to specific performance on another basis, *viz.*, that the subsequent oral arrangement did not constitute a variation of the agreement between the parties, as embodied in the documents, but was merely an arrangement for performance of that agreement in one of two alternative methods provided for in the option, the plaintiff's intention obviously having been to accept the option, and to have his acceptance acted upon.

AN APPEAL from the judgment of Barlow J., ordering specific performance of an agreement for the sale of land by the defendant to the plaintiff.

18th and 19th October 1950. The appeal was heard by LAIDLAW, AYLESWORTH and BOWLBY JJ.A.

J. Shirley Denison, K.C., for the defendant, appellant: The agreement herein is unenforceable under The Statute of Frauds, R.S.O. 1937, c. 146. Even if there is a sufficient memorandum in writing to satisfy the statute, the agreement that the plaintiff seeks to enforce is not the agreement set out in that memorandum. The documents all contemplated payment of the balance of the purchase-price partly in cash and partly by the giving of a mortgage, whereas the agreement set up by the plaintiff, and ordered by the judgment below to be specifically enforced, calls for all cash. [LAIDLAW J.A.: While the pleading does not set up the variation, yet the plaintiff led evidence at the trial as if he had pleaded it, and no objection was taken.] We could not object, because we had to show what really happened.

Another reason why this agreement should not be enforced is that the plaintiff was in fact the defendant's agent. Although the document is called an "option to purchase" it is not intended to be that in fact, but is rather an agreement indicating a pure agency relationship. [LAIDLAW J.A.: It was not until litigation was begun that anyone suggested it was not an option to purchase. That was not the reason given by the defendant's solicitor for the defendant's refusal to sign the deed—he said the defendant wanted more money.]

If the parties did agree orally to a variation in the terms of payment as expressed in the written documents, then those documents do not represent the true agreement between the

parties, which the plaintiff seeks to enforce specifically, and there is no memorandum in writing of the contract as varied. But quite apart from the variation, the documents do not constitute a sufficient memorandum, because the value of the lots was not ascertained, and the provision as to \$2,000 would apply to the building of any house on Fennell Avenue. The so-called "acceptance" is not an acceptance of the defendant's offer, as made, and hence does not constitute a sufficient memorandum, or even a binding contract—a parol agreement could not make it an enforceable contract. Further, this contract falls within the class of agreements that are so vague that the Court will not order specific performance.

If there is no contract that is enforceable under The Statute of Frauds the defendant, no matter how lax he may have been, is entitled to the protection of the Court. Where the matter is one of law the Court will raise it, even if the party has not done so himself: *Peccin v. Lonagan and T. & N. O. Railway Commission*, [1934] O.R. 701 at 704, [1934] 4 D.L.R. 776. The same is true of our defence that the relationship between the parties was one of principal and agent.

H. W. A. Foster, K.C., for the defendant, appellant: As to the effect of the oral variation in the original agreement, we refer to *Beer v. Lea* (1912), 29 O.L.R. 255, 14 D.L.R. 236; *Johnson v. Humphrey*, [1946] 1 All E.R. 460; *Hawkins v. Price*, [1947] Ch. 645, [1947] 1 All E.R. 689; *Beckett v. Nurse*, [1948] 1 K.B. 535, [1948] 1 All E.R. 81. There is one recognized exception to the general rule, in that where a term, exclusively for the benefit of one party, has been omitted from a written contract that party can waive the term and demand specific performance: *Fry on Specific Performance*, 6th ed. 1921, p. 243. Here the trial judge held that the plaintiff could waive the provision for a two-year mortgage and specifically enforce the contract as calling for all cash. But the provision for a mortgage was not wholly for the plaintiff's benefit, and therefore could not be waived by him. We refer to *North v. Loomes*, [1919] 1 Ch. 378; *Hawkins v. Price*, *supra*; *Paramount Theatres Ltd. v. Brandenberger*, 62 O.L.R. 579, [1928] 4 D.L.R. 573.

As to the question of agency, we refer to *Bentley and Wear v. Nasmith* (1912), 46 S.C.R. 477, 3 D.L.R. 619, and The Real Estate and Business Brokers Act, 1946 (Ont.), c. 85.

William Schreiber, K.C., for the plaintiff, respondent [directed by the Court that he need not argue the question of agency]: The original offer is complete—it sets out the names of the parties, a description of the property, the total purchase-price and the amount of the deposit. The wording of the “acceptance of option” ties in directly with this, and constitutes an unequivocal acceptance of the offer contained in the option. It is true that something additional has been inserted in the acceptance, but it is not to the defendant’s disadvantage. It is a provision that the plaintiff must pay \$2,000 on account of principal before starting to build on any street. [LAIDLAW J.A.: Is the option sufficient in its terms to enable the Court to decree specific performance? There is no provision for determining the value of particular lots, so how can the Court decree specific performance?] The lots are shown on the plan given by the plaintiff to the defendant, and for the purpose of a partial discharge of mortgage they are to be assumed to be of equal value.

The first few words of ex. 5 are a clear and unequivocal acceptance of the option, and any further provision, inconsistent with that, can be disregarded. With the acceptance we sent a cheque for \$450 which, with \$50 paid to the defendant on a previous occasion, was accepted by the defendant as the deposit called for by the option. The change in wording is not a material change in the agreement. [AYLESWORTH J.A.: The provisions as to building and discharging the mortgage are somewhat different in the two documents.] There is no real inconsistency, because the option contains no restriction on building, and the vendor’s obligation to discharge is not affected by the acceptance. The “value” of the lots, referred to in the option, is accepted as \$50 each, and the \$2,000 referred to in the acceptance is a mere mathematical extension, and not a variation. The provision for payment of the full balance “in two years, or sooner” gives us an absolute discretion as to the time of payment, provided that it is all paid within the two years.

The acceptance, although it was not in the exact words of the option, was nevertheless an unequivocal acceptance, and constituted a binding contract: Pollock on Contracts, 12th ed. 1946, p. 32. There was nothing in the nature of a counter-proposal, and the terms were in substance the same: *The English and Foreign Credit Company, Limited v. Arduin et al.*

(1871), L.R. 5 H.L. 64; *Baines et al. v. Woodfall* (1859), 6 C.B.N.S. 657, 141 E.R. 613. An addition that does not derogate from the actual acceptance of an offer does not prevent the formation of a contract: *Clive v. Beaumont* (1848), 1 DeG. & Sm. 397, 63 E.R. 1121; *Gibbins v. The Board of Management of the North-Eastern Metropolitan Asylum District* (1847), 11 Beav. 1, 50 E.R. 716; Pollock, *op. cit.*, p. 30.

At the trial I took the position that the agreement as to payment of the balance in cash constituted an oral variation in the contract, but on reconsideration I submit that it was not a change at all, because, as argued above, we had the privilege of paying off the balance at any time. At any rate, if it was a variation, it was not to the defendant's disadvantage and hence does not preclude me from enforcing the contract.

J. Shirley Denison, K.C., in reply: If the contract, as embodied in the written documents, is substantially varied by parol agreement, The Statute of Frauds intervenes to make it unenforceable. An option must be strictly construed: *Pierce v. Empey*, [1939] S.C.R. 247 at 252, [1939] 4 D.L.R. 672. There have been several important variations by parol, and a mortgage at 5 per cent. would be more advantageous to the vendor than an all-cash payment.

As to contracts under seal and specific performance we refer to 7 Halsbury, 2nd ed. 1932, para. 86, p. 67, and 31 Halsbury, 2nd ed. 1938, para. 364, p. 332.

Cur. adv. vult.

12th April 1951. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This is an appeal from the judgment of Mr. Justice Barlow, dated 27th June 1950, decreeing specific performance of an agreement for the sale by the defendant appellant to the plaintiff respondent of the lands in the pleadings mentioned.

Appellant attacks the judgment upon several grounds. As urged before us, these may be summarized as follows: that there never was a concluded contract; that the relationship between the parties was that of principal and agent and not that of vendor and purchaser; that the sale was so improvident as to impute fraud to the respondent; that there was no legal tender by the respondent; that the documents relied upon by the respondent

did not constitute a sufficient written memorandum of the agreement under The Statute of Frauds, R.S.O. 1937, c. 146; and that evidence was improperly admitted of an oral and therefore unenforceable term in variation of the alleged written agreement.

It is not necessary here fully to state the facts, which are set out in concise and accurate form in the learned trial judge's reasons. He found that the parties were *ad idem*; that the relationship between them was that of vendor and purchaser and not that of principal and agent; that the sale was for adequate consideration, and that the circumstances dispensed with tender. At the conclusion of appellant's argument the Court intimated its agreement with these findings and counsel for the respondent accordingly was requested to limit his argument to the question of the sufficiency of the agreement under The Statute of Frauds, including the question raised as to the alleged oral variation. In decreeing specific performance the learned trial judge not only found for the respondent as to the sufficiency of the writings but held that there had been a subsequent oral variation for the appellant's benefit which, being submitted to by respondent, did not disentitle respondent to the decree. I turn first to consider the sufficiency or otherwise of the agreement under The Statute of Frauds so far as the writings are concerned.

The relevant documents are: ex. 2, dated 7th January 1950, purporting to be an option from the appellant to the respondent and executed by the appellant under seal; an acceptance of option dated 10th January 1950, addressed to the appellant and executed by the respondent (ex. 5); a cheque dated 10th January 1950, drawn by the respondent, payable to the appellant or his order, for \$450 (ex. 3) and a receipt of the same date executed by the appellant (ex. 4).

In my view these documents are all to be considered together so far as the statute is concerned. The acceptance of option refers in terms to the option itself; the cheque, which was endorsed and cashed by the appellant, has written upon the face of it: "Acceptance of option on land, Fenell & Wentworth St.", a reference to the lands, the subject matter of the transaction, and the receipt executed by the appellant reads as follows: "Received cheque from T. Ramsden for \$500.00 to apply on Acceptance of Option on land (describing the lands), and there appears thereon the following notation: "\$450.00 cheque and

\$50.00 paid for Option.” Clearly, those of the above documents, except the option itself, signed by the appellant incorporate by reference both the option and the acceptance thereof. The terms are set out fully and the statute, I think, is satisfied.

There remains the question as to the alleged oral variation in the terms of the agreement as written. Upon this aspect of the case the learned trial judge found as a fact that the appellant on the 12th January 1950, in the presence of the witness Rebechi, and at the office of the respondent, requested that all of the purchase-price be paid in cash rather than that a mortgage be given to him for the balance of purchase-price of \$9,000; that the respondent agreed to pay all cash and that the arrangement thus brought about was for the benefit of the appellant and was confirmed on 17th January 1950 by the appellant's solicitor. In my view there is overwhelming evidence to support these findings and I would not disturb them. The learned trial judge, however, as I have said already, treated this arrangement as a variation of the written agreement, and in decreeing specific performance of the agreement which he considered to have been so varied, relied upon and cited a short statement appearing in Pollock on Contracts, 13th ed. 1950, p. 418. That statement (which I have italicized) with its immediately surrounding context is as follows:

“On the other hand a party cannot, at all events where the contract is required by law to be in writing, come forward as plaintiff to claim the performance of the real agreement which is not completely expressed by the written contract. Thus in the case of *Townshend v. Stangroom* [*infra*] (referred to by Lord Hatherley when V.-C., as perhaps the best illustration of the principle), there were cross suits, one for the specific performance of a written agreement as varied by an oral agreement, the other for specific performance of the written agreement without variation; and the fact of the parol variations from the written agreement being established, both suits were dismissed. And the result of a plaintiff attempting to enforce an agreement with alleged parol variations, if the defendant disproves the variations and chooses to abide by the written agreement, may be a decree for the specific performance of the agreement as it stands at the plaintiff's cost.

"But it is open to a plaintiff to admit a parol addition or variation made for the defendant's benefit, and so enforce specific performance, which the defendant might have successfully resisted if it had been sought to enforce the written agreement simply. This was settled in Martin v. Pycroft [infra]: 'The decision of the Court of Appeal proceeded on the ground that an agreement by parol to pay 200l as a premium for . . . a lease [for which there was a complete agreement in writing not mentioning the premium] was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200l. The case introduced no new principle as to the admissibility of parol evidence.'

"It is to be observed (though the observation is now familiar) that these doctrines are in principle independent of the Statute of Frauds. What the fourth section of the Statute of Frauds says is that in respect of the matters comprised in it no agreement not in writing and duly signed shall be sued upon. This in no way prevents either party from showing that the writing on which the other insists does not represent the real agreement; the statute interferes only when the real agreement cannot be proved by a writing which satisfies its requirements. Then there is nothing which can be enforced at all. The writing cannot, because it is not the real agreement; nor yet the real agreement, because it is not in writing. A good instance of this state of things is Price v. Ley [(1863), 4 Giff. 235, 66 E.R. 692, affirmed 32 L.J. Ch. 530]. The suit was brought mainly to set aside the written agreement, and so far succeeded. It appears not to have been seriously attempted to insist upon the real agreement which had not been put into writing."

In Martin v. Pycroft (1852), 2 DeG. M. & G. 785, 42 E.R. 1079, a decision of the Court of Appeal in Chancery, the defendants had agreed, in writing, to grant the plaintiff a lease subject to the same covenants, clauses and agreements as were contained in an expiring lease under which plaintiff then held the property. The defendants contended and the plaintiff admitted that the real bargain was for a lease to be granted in consideration of a premium of £200, which lease should contain a covenant on the lessee's part to lay out £200 besides, in a manner analogous to the covenant for laying out £200 contained in the expiring lease. The Court held that on a proper construction of the written

document the premium contended for by the defendants was excluded, but that the covenant for laying out £200 was included. Specific performance of the agreement thus construed was decreed subject to the payment by the plaintiff of the £200 premium.

Decisions bearing upon the question as to the circumstances in which, in a suit for specific performance, the decree will be granted subject to an oral term at variance with the written agreement, are numerous and not infrequently the limits of the doctrine are misapprehended. Especially is this so since the authorities of more than two centuries are not always reconcilable. I have considered a great many of these decisions but shall make brief reference to a few of them only as illustrating what I apprehend to be the true rule so far as here relevant.

The general proposition is clear and that is that specific performance of an agreement for the sale of land will only be decreed where all material terms of the agreement are in writing in compliance with the statute. I dismiss from consideration the well-known exceptions to the general rule, namely, proof of fraud or mistake. No fraud is suggested as to the alleged oral term and the requisites to establish mistake, namely, an antecedent oral agreement and a common intention to put that agreement in writing, are simply not present. In *The Marquis Townshend v. Stangroom* (1801), 6 Ves. 328, 31 E.R. 1076, there were cross-suits; one by the plaintiff for the specific performance of a written agreement as varied by an oral agreement; the other by the defendant for specific performance of the written agreement without variation. Both suits were dismissed: that of the plaintiff because, the oral variation as alleged by him having been proved, the agreement which he sought to enforce did not comply with the statute; that of the defendant because the written agreement which he sought to enforce in denial of the oral variation was not the real bargain between the parties.

The exception to this general rule, at least so far as relevant to the case at bar, is not always stated in the same language. It is thus stated in *Fry on Specific Performance*, 6th ed. 1921, p. 243, note 1: "It would seem . . . that where a stipulation of no great importance and solely benefiting the plaintiff is omitted from the memorandum, the defendant will not, in an action for specific performance, in which the stipulation is not asserted against him, be allowed to set up that the memorandum

is insufficient by reason of such omission to satisfy the statute, if the plaintiff chooses to waive the stipulation." And see *North v. Loomes*, [1919] 1 Ch. 378.

This statement of the rule does not help the respondent; he is not waiving the oral variation, if variation it be, and the appellant is not admitting it.

In Williams on Vendor and Purchaser, 4th ed. 1936, p. 5 (vol. 1), the rule is stated somewhat differently: "It appears, however, that if a stipulation, which is to the detriment or for the benefit of one of the parties exclusively, is omitted from the memorandum, that party may submit to perform it or waive the benefits of it (as the case may require), and may with such submission or waiver specifically enforce the contract as stated in the memorandum."

For an interesting discussion as to the difference in statements of the rule, see the judgment of Evershed J., as he then was, in *Hawkins v. Price*, [1947] Ch. 645, [1947] 1 All E.R. 689.

Four authorities are cited by the learned author of Williams in support of the text as I have quoted it. The first three cases are *London and Birmingham Railway v. Winter* (1840), Cr. & Ph. 57, 41 E.R. 410; *Martin v. Pycroft*, *supra*; and *Smith v. Wheatcroft* (1878), 9 Ch. D. 223. In the two cases last cited the defendant, in resisting the plaintiff's suit for specific performance, alleged and proved an oral variation in the written agreement and the plaintiff submitted to it. Here, the defendant makes no such allegation; he denies that there ever was any contract at all. Further authorities along the same line are *Jocynes v. Statham* (1746), 6 Atk. 388, 26 E.R. 1023; *Ramsbottom v. Gosden* (1812), 1 Ves. & B. 165, 35 E.R. 65; *Winch v. Winchester* (1812), 1 Ves. & B. 375, 35 E.R. 146; and *Manser v. Back* (1848), 6 Hare 443, 67 E.R. 1239. In the last-mentioned of the four cases cited in Williams, namely, *North v. Loomes*, *supra*, the defendant alleged and proved the existence of an unimportant oral term, omitted from the written contract, which was in the plaintiff's favour. The plaintiff waived the oral term and upon so doing was granted specific performance of the agreement as written. In *London and Birmingham Railway v. Winter*, *supra*, the facts of the case and the relevant principle sufficiently appear in the following passage from the judgment of Lord Chancellor Cottenham at p. 61:

"I wished, however, to look at the papers, in consequence of a statement which came out on the cross-examination of the Defendant's agent, by which it appeared there was an understanding between him and the agent of the company, that, in all contracts for land required by the company, the value of any timber on the land, the expense of investigating the title, and other expenses which, unless there was some special agreement between the parties, would fall on the vendor, should be paid for in addition to the purchase money specified in the contract: and that, in consequence of this understanding, these points were not included in the written contract in question. This was urged as a reason why the Court should refuse a specific performance. It cannot possibly have that effect; but it might have this effect, namely, that the Court would not decree a specific performance without taking care that the party should have the benefit of such an understanding. Such an understanding cannot operate to defeat the contract; because, according to the statement of the witness, it never was intended to form part of the written contract, but was purposely kept out of it.

"This is not a case within the meaning of those decisions in which the Court has said that it will not specifically perform the contract with a variation. If the Court finds a written contract has been entered into, and the Plaintiff says, 'That was agreed upon, but then there were certain other terms added, or certain variations made,' the Court holds that in such a case the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties; and, therefore, refuses specifically to perform such an agreement. On the other hand, it is quite competent for the Defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the Plaintiffs' title to have a specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement, or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for. That this is the rule of the Court is sufficiently established in many cases, of which I will only mention three, *Joynes v. Statham* [*supra*], by Lord Hardwicke; *Townshend v. Stangroom* [*supra*], by Lord Eldon; and *Ramsbottom v. Gosden* [*supra*], by Sir William Grant."

From an analysis of these authorities and many others, I do not think the respondent, upon the facts of the case at bar, can invoke the exception to the general rule even under the broader statement of the rule as phrased in Williams. What is the oral arrangement and the position of the parties we have here to consider? It is that on 12th January 1950, subsequent to the execution of the documents to which reference has been made, both parties agreed that respondent should pay all cash rather than give a mortgage for the balance of the purchase-price. The learned trial judge has found that this arrangement was for the benefit of the appellant. Certainly, to put it mildly, it could not be said to be exclusively for the benefit of the respondent, nor is the respondent seeking to waive it. On the contrary the respondent is simply saying in effect: "The written agreement, if it has been varied by a subsequent oral agreement, has been varied for the benefit of the appellant. Although he denies that there ever was any such variation, or even any contract at all, and pleads The Statute of Frauds, I insist upon specific performance of the written agreement subject to that variation, if variation there be." If I am correct in my view of the authorities, the respondent is not entitled, even in equity, to take that position and upon that ground his suit would fail.

But the respondent thus puts his case merely in the alternative; his antecedent and, I think, more substantial argument is that the oral arrangement is not a variation of the written agreement but merely a consent by both parties to the performance of that agreement in one of two ways therein provided. I consider the argument to be sound and would give effect to it.

I quote in full the terms as to purchase-price and payment thereof appearing in the option (ex. 2):

"For the sum of Fourteen thousand dollars (\$14,000.00) payable as follows: Five hundred dollars to be paid as a deposit should same be accepted, and the sum of Four thousand five hundred dollars on closing of Sale and the remainder of the purchase price to be paid in full in two years, or sooner, with interest on the unpaid balance at the rate of 5% per annum, the Vendor to release any Lots from the Mortgage on payment of the value of same, when houses are roofed in."

Turning now to the acceptance of option (ex. 5), we find the following forthright language in the opening words thereof:

"I hereby accept the option as given to me and dated the Seventh Day of January 1950." Then after a repetition of the description of the lands appears the following:

"Price \$14000.00 Five hundred paid to you by Cheque on this date as per terms of Option and \$4,500.00 on closing of Sale, and the remainder of Purchase Price namely \$9000.00 to be arranged by a Mortgage at 5% interest per annum on unpaid principle [*sic*].

"The purchaser to be privileged to build houses Etc on the South Side of Fennell avenue on completion of Sale, and to pay you \$2000.00 before commencing to Build off the principal (on any other of streets as shown on preliminary Plan herewith) at any time and the whole of the principle to be due and payable in 2 years from Date of Closing of Sale."

The first difference between the acceptance of the option and the option itself is the reference to the "privilege" of building houses on the south side of Fennell Avenue on completion of sale. An examination of the option discloses that there is really nothing therein to prevent such action on the part of the respondent and it was therefore unnecessary to mention the "privilege" in the acceptance of option.

The next change is the undertaking on the part of the respondent in the acceptance of option to pay \$2,000 before commencing to build on any street other than Fennell Avenue—a gratuitous offer by the respondent to do something which he was not called upon to do under the terms of the option; the option contains no prohibition against building on any street and contains no obligation to pay the appellant anything before building. This \$2,000 is to be paid "at any time", but the meaning, I think, is clear, namely, that if and when the respondent were to commence building operations on any street in the plan other than Fennell Avenue \$2,000 was to be paid to the appellant upon each such occasion.

The remaining stipulation as to payment of moneys as it appears in the acceptance of option is: "The whole of the principle [*sic*] to be due and payable in 2 years." It is to be observed that no mention whatsoever is made in the acceptance of option of the provision of the option respecting partial discharges of mortgage. In these circumstances the Court is asked to find

that the parties' subsequent agreement that respondent should pay all cash is a variation of the written contract.

The cardinal principle of construction which I think to be peculiarly applicable to this case is stated in Broom's Legal Maxims, 10th ed. 1939, p. 361, in the following language:

"The two rules of most general application in construing a written instrument are—1st, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat*, and 2ndly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties."

The intention of the parties as I gather it from exhibits 2 and 5 taken by themselves, and *a fortiori* from an examination of the two other documents executed by the appellant concurrently with the delivery to him of the acceptance of option, namely, the cheque, ex. 3 (endorsed by the appellant) and the receipt, ex. 4, given by the appellant to the respondent, is clearly indicated; that intention was to accept the option and act upon the acceptance. As can be seen at a glance from those parts of the option and the acceptance which I have quoted, the language employed is clumsy, inefficient and careless, even as to spelling. I regard the reference in the acceptance of option to the whole of the "principle" being due and payable in two years as merely one instance of that carelessness. I do not think the parties intended, or, reading the documents together, expressed an intention to eliminate from the option the right to prepay the mortgage moneys at any time. I think the intention of the parties, as expressed by them, would be frustrated if any other construction than that I have expressed were put upon the documents, and I think the particular words used in the acceptance of option, taken in their proper context, must yield as a matter of construction to the clear and expressed intention of the parties, which was that the option should be accepted and the parties thereby bound in agreement with one another. When the parties orally agreed subsequently that the respondent should pay all cash they were merely agreeing upon performance of the agreement into which they had entered in one of two alternative methods, as provided in the option. Oral evidence clearly was admissible to prove the arrangement between the parties as to the particular method of performance they preferred.

In the result, therefore, the learned trial judge, in my view, was right in awarding the respondent specific performance as decreed by him.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Christilaw & Gage, Hamilton.

Solicitor for the defendant, appellant: Frank Morrison, Hamilton.

[COURT OF APPEAL.]

**Bulova Watch Company Limited v. The Attorney-General
of Canada.**

Judgments and Orders—Form of Judgment—Action for Declaration—Admissions Made by Amendment to Statement of Defence—Right of Plaintiff to Declarations Sought—The Judicature Act, R.S.O. 1950, c. 190, s. 15(b).

The plaintiffs sued for declarations as to the exemption of certain goods from excise tax on importation, and as to their right to import the goods without taking out manufacturers' or excise licences for the purpose. The trial judge held that but for certain legislation that came into force after the issue of the writ the plaintiffs would have been entitled to judgment, but that, giving effect to that legislation, the plaintiffs' claims might be satisfied by admissions to be made by amendment to the statement of defence, following the form of the declarations sought. He accordingly gave leave to amend, on terms as to costs, and directed that if the amendments were made the action should be dismissed without costs, but that if they were not made the plaintiffs should have judgment with costs. The formal judgment merely set out the leave to amend on terms and that upon the amendments being made the action should be dismissed. One plaintiff appealed.

Held, the trial judge having been right as to the effect of the legislation, this was not a satisfactory disposition of the action. The case was clearly one where the appellant was entitled to the formal declaration of the Court as to its rights. The declaration sought would state in essence that the appellant was entitled to import component parts for watches without payment of excise tax and without the issue of a manufacturer's or excise licence, and the appellant should not be left to assert its rights by presenting to customs collectors a brief, as it were, consisting of the pleadings and the reasons for judgment. The judgment should accordingly be varied by setting out in it declarations along the lines of the amendments to the statement of defence. The judgment should also show that the terms as to costs were complied with and the amendments were in fact made.

Judgment of McRuer C.J.H.C., [1950] O.R. 429, varied.

AN APPEAL by one of the plaintiffs from the judgment of McRuer C.J.H.C., [1950] O.R. 429, [1950] 4 D.L.R. 156 (*sub nom. Gruen Watch Company of Canada Limited et al. v. The Attorney-General of Canada*).

20th and 21st February 1951. The appeal was heard by HENDERSON, LAIDLAW, AYLESWORTH, MACKAY and GIBSON JJ.A.

[*J. D. Arnup, K.C.*, for the defendant, respondent, moved to quash the appeal, but subsequently withdrew the motion.]

John Jennings, K.C., for the appellant: We ask for a declaration of the Court that there was and is no law or regulation that requires the plaintiffs, when importing watch movements, to take out licences or pay anything at the customs except duty. The trial judge in effect found this, because he in effect directed the defendant to admit it by amending his statement of defence, but the Department still requires licences. So to-day, although there is a finding that the plaintiffs are entitled to get goods through customs without presenting a licence, they are still required to produce one. It is not sufficient for the Court to make a finding without going on to express it in a judgment. The plaintiffs have a right to a judgment declaring that they are entitled to bring in watch movements, bracelets, etc., without a licence. [AYLESWORTH J.A.: Your point is that on the basis of the pleadings as they now stand there is an admission that the plaintiffs are not required to have either a manufacturer's or an excise licence to pass these parts through customs, but that this admission has not been backed up by a declaration in the judgment, and that you should have that, particularly because the plaintiffs are still being required to produce licences?] Yes. [AYLESWORTH J.A.: The result of the judgment is that all the things you contend for are admitted in the pleadings but not covered in the judgment. It seems idle for you to argue here that the plaintiffs should not have to do this or that—it is admitted, and is no longer in issue. Surely the argument could proceed on the basis of whether you are sufficiently successful by having gained the admissions in the pleadings or whether you should have them in the form of declarations of the Court.] We ask that the findings of the trial judge be expressed in a declaration. We are entitled as a matter of right to a declaration asserting our rights: *China Navigation Company, Limited v. Attorney-General*, [1932] 2 K.B. 197. Any suggestion that

there should not be a declaration if there is an alternative remedy is met by *Hanson v. Radcliffe Urban District Council*, [1922] 2 Ch. 490.

J. D. Arnup, K.C. (*R. B. Robinson*, with him), for the defendant, respondent: The Court is being asked to make a declaration which is either for the purpose of making some hypothetical change in the appellant's business, or to get money back, or to resist a claim, or for a purpose that is of no use to anyone. [AYLESWORTH J.A.: Have you any quarrel, leaving aside for the moment the question whether it should be by admission in the pleadings or by a declaratory judgment, with its appearing clear on the record that the plaintiffs may import component parts as such without payment of any excise tax and without being required to hold a licence?] I have pleaded almost in those words. [AYLESWORTH J.A.: Then why should not the appellant have those things set out in a declaratory judgment, so that customs collectors can see clearly what it is entitled to do?] No issue remains. A plaintiff cannot come to the Court and ask for a declaration in regard to things that are not in issue. The collectors take their instructions from the Department.

John Jennings, K.C., in reply.

Cur. adv. vult.

16th April 1951. The judgment of the Court was delivered by

AYLESWORTH J.A.:—This is an appeal by the plaintiff Bulova Watch Company Limited from a judgment pronounced by the Chief Justice of the High Court on the 15th May 1950, dismissing the plaintiffs' action without costs: *Gruen Watch Company of Canada Limited et al. v. The Attorney-General of Canada*, [1950] O.R. 429, [1950] 4 D.L.R. 156. The action as to several plaintiffs was discontinued at trial. Certain of the plaintiffs filed and served notice of appeal to this Court; the plaintiff Bulova Watch Company Limited is now the sole remaining appellant.

It is necessary to relate in some detail, and in chronological order, the events leading up to the appeal. The action is brought for certain declarations: The Judicature Act, R.S.O. 1937, c. 100 (now R.S.O. 1950, c. 190), s. 15(b). The learned Chief

Justice of the High Court, after a careful review of the authorities, concluded that had it not been for certain amendments to The Excise Tax Act, R.S.C. 1927, c. 179, which came into force in December 1949, some months after the issue of the writ, the plaintiffs would have been entitled to judgment, with some amendment of the precise wording of the declarations as claimed. He further considered that, giving effect to those amendments of the statute, the plaintiffs' claims might well be satisfied by admissions to be made in the statement of defence, really as an alternative to judgment for the plaintiffs, and in his reasons for judgment gave leave to the defendant to amend its statement of defence by pleading the amending statute and by making admissions following somewhat closely the form of certain of the declarations as sought by the plaintiffs. Leave to amend was granted upon the condition that the defendant pay the plaintiffs' costs to the date of the making of the amendments forthwith after taxation. The reasons further provided that in the event the costs were not paid and the amendments were not made the plaintiffs should have judgment substantially as prayed. The judgment, therefore, was really in the alternative; upon the defendant electing to do certain things the action was to be dismissed without costs; failing such election the plaintiffs were to have judgment with costs.

This aspect of the reasons for judgment is ignored in the actual judgment itself as settled and issued. The formal judgment in effect provides leave to the defendant to amend upon the term as to payment of costs already mentioned, and that upon such amendment and payment the action be dismissed without costs. There the matter is left. The actual position, which cannot be ascertained from a perusal of the judgment itself, is that the amendments in fact were made by the defendant and the plaintiffs' costs were taxed and paid.

The appellant submits that any relief to which it is entitled should be reflected in the judgment itself by way of declarations and that it is wholly unsatisfactory, and really not a judicial disposition of its case, for the appellant to be left to attempt to demonstrate its rights by reference to the statement of defence as amended and to the reasons for judgment.

At the opening of the appeal a preliminary objection, really by way of motion to quash, was taken by the respondent on the

ground that the appellant and other of the plaintiffs had taken the benefit of the judgment appealed from and could not now, having taken such benefit (payment of their taxed costs to the date of the amendment of the statement of defence), continue the appeal. After this motion had been argued at some length counsel for the respondent, on further reflection as to the effect of certain correspondence passing between the parties after delivery of the reasons for judgment, and in view of the somewhat peculiar course of the proceedings leading to amendment of the statement of defence, settlement and issue of the judgment and taxation and payment of the plaintiffs' costs, frankly stated to the Court that he considered it unfair to rely, in any way, upon what the appellant had done as a ground for quashing the appeal, and, with leave of the Court, withdrew his motion entirely.

The appeal itself was argued also at some length, including the right of the defendant to plead and rely upon the subsequent amending legislation. With respect, I think the learned Chief Justice of the High Court was correct in the effect he gave to this legislation, and upon that view the real remaining issue between the parties can be stated quite simply. It is this: Is it a sufficient and judicial answer to the appellant's action that its position as outlined in its claim is vindicated by the reasons for judgment and by the admissions made in the statement of defence as amended? With respect, I do not think it is. I think that the case is clearly one in which the appellant is entitled to the formal declaration of the Court as to its rights. So far as now relevant the declarations sought, in essence, would assert that the appellant is entitled to secure entry through customs of certain component parts for watches without payment of excise tax upon such entry and without the issue of a manufacturer's and an excise licence for that purpose. It is, I think, a fair inference from the evidence that the appellant's rights in this respect were not acceded to unequivocally, at least until the amendments to the statement of defence were made as permitted by the reasons for judgment. If I am right in this, then it is but poor comfort to the appellant to leave it to assert its rights by presenting a brief, as it were, consisting of the pleadings and the reasons for judgment, to the customs collectors at ports of entry or to others having authority in such

matters. Those rights, in my opinion, should have been and ought now to be stated by way of formal declaration in the judgment itself.

I would therefore allow the appeal with costs, set aside the judgment appealed from, and direct that judgment be entered for the appellant:

(1) Reciting leave upon terms to the defendant to amend its statement of defence, taxation and payment of the plaintiff's costs in compliance with such terms and that the amendments (setting them out) have been made accordingly.

(2) Declaring that:

(a) There is no excise tax payable upon watch movements, watch cases, wrist bands, bracelets or display cases as such except where such cases, wrist bands or bracelets are goldsmiths' or silversmiths' products under item 14(c) of schedule 1 of The Excise Tax Act as enacted by 1949, 2nd sess., c. 21, s. 10.

(b) The appellant is entitled to have watch movements, watch cases, wrist bands or bracelets or display cases, shipped to it from abroad, passed through customs and delivered to it without taking out a manufacturer's or excise licence or paying any excise tax at the time of entry of the said goods except where such cases, wrist bands or bracelets are goldsmiths' or silversmiths' products under item 14(c) of schedule 1 of The Excise Tax Act as amended.

(3) Making no further order as to costs of the action.

If there is any difficulty as to the form which the Court's order should take, the matter may be spoken to in chambers.

Appeal allowed with costs.

Solicitors for the appellant: Jennings & Clute, Toronto.

Solicitors for the defendant, respondent: Mason, Foulds, Arnup, Walter & Weir, Toronto.

[WELLS J.]

Roy v. Kloepper Wholesale Hardware and Automotive Company Limited.

Sale of Land—Enforcement of Contract—Repudiation by Vendor—Action by Purchaser for Specific Performance—Action Instituted before Day Fixed for Closing—Whether Premature—Absence of Tender.

Where a vendor, having entered into a contract for the sale of land, repudiates the contract, the purchaser is entitled to sue for specific performance without waiting for the day fixed by the contract for closing. *Hochster v. De la Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1873), L.R. 7 Ex. 111; *Roberto v. Bumb*, [1943] O.R. 299 at 310, applied. The fact that he has not tendered the balance of the purchase-price will not be a bar to his action in such circumstances, if he was not in default at the time of the repudiation, and has since been ready and willing to complete the contract. *Jones et al. v. Barkley* (1781), 2 Doug. K.B. 684 at 694, applied; *British and Benningtons, Limited v. North Western Cachar Tea Company, Limited et al.*, [1923] A.C. 48, referred to.

AN ACTION for specific performance of a contract for the sale of land by the defendant to the plaintiff.

13th to 15th November 1950. The action was tried by WELLS J. without a jury at Toronto.

F. A. Brewin, K.C., for the plaintiff.

R. M. Willes Chitty, K.C., for the defendant.

17th April 1951. WELLS J.:—This is an action for the specific performance of a contract in writing made between the plaintiff and the defendant company on the 29th November 1949, executed by the plaintiff and accepted under the corporate seal of the defendant on the same day. It concerned the sale by the defendant company to the plaintiff of premises at 44, 46, 48 and 50 Wellington Street East, in the city of Toronto, for the sum of \$52,500. On the 5th December 1949 the defendant company caused a telegram to be forwarded to the plaintiff saying: "We repudiate contract for sale of premises 44-50 Wellington Street East, on grounds of want of mutuality." It would appear from the evidence that two telegrams were sent, one to the residence of the plaintiff in the county of Ontario, and one to his Toronto residence. On the following day the solicitors for the defendant company wrote a letter to the solicitors for the plaintiff as follows:

"Further to the writer's telephone conversation of yesterday with Mr. Ferguson, please be advised that our client has wired Mr. Roy yesterday as follows:

“We repudiate contract for sale of premises 44-50 Wellington St. E., on grounds of want of Mutuality.’

“Will you please return draft deed to us at once.”

Subsequently, on 13th December, the plaintiff's solicitors, who apparently did not accept the position outlined by the telegram and solicitors' letter, submitted requisitions on title and on the 14th December they wrote the solicitors for the defendant insisting that the contract was good and binding and that the plaintiff was entitled to proceed with it in the regular way. This letter also contained the following sentence which may have some subsequent bearing on the rights of the parties:

“You might advise us if you waive tender and we can get on with the action for specific performance.”

To this the solicitors for the defendant replied on the 15th December as follows: “We have authority to accept service of any writ you may have instructions to issue in the above matter.”

The action as presented for the plaintiff was exclusively one for specific performance. While the prayer of the statement of claim contains a claim for damages by reason of the defendant's repudiation, these damages are, as I see it, only those which may have been occasioned by the delay in completion and are ancillary to the main claim which is for specific performance. Certainly the plaintiff's case was so presented. The defendant company raises certain defences on the pleadings and certain defences in law. It may be convenient to deal with those raised by the statement of defence first.

It is not denied by the defendant that the contract in question was executed by it. What is alleged is that there were certain material representations of fact made by the plaintiff to the defendant prior to the actual signing of the contract. It is pleaded that the contract also contained certain provisions for the leasing by the plaintiff to the defendant of part of the premises concerned. In respect of this matter it is pleaded that there was no provision for determining liability between the parties for the heating of the premises and the supplying of janitor and cleaning service, or for the provision of electricity, water, gas or elevator service. Nor, it is said, was there any provision for any right of access by the plaintiff and his tenants to other parts of the building when the portion occupied by the

defendant was closed, or for the removal by the defendant of its fixtures.

There is also an allegation that the rental to be paid by the defendant to the plaintiff was for heated space, an obligation which it is said the plaintiff repudiated subsequent to the execution of the said contract. There is also an allegation of misrepresentation by the plaintiff to the defendant in that the plaintiff represented himself as a warehouse-man compelled to secure new accommodation by reason of the expropriation of a building occupied by him, and that as between him and the defendant no difficulty would occur by reason of the continued occupation by the defendant for its business of a reasonable portion of the lands and building referred to in the contract. It is alleged that these representations were made by the plaintiff knowing them to be false and intending that the defendant should act on them, which it is said the defendant did, and was so induced to execute the contract in question. It is therefore said that the contract should not be specifically enforced on the ground that the contract is incomplete in respect of material matters, that it is ambiguous and uncertain with respect to the defendant's tenancy, and that the contract was obtained by reason of material representations of fact made by the plaintiff to the defendant. The Statute of Frauds, R.S.O. 1937, c. 146, is also pleaded.

With respect to these defences raised, it may first be noted that the contract in question contains the following clause: "It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing."

Secondly, in considering the evidence there is remarkably little variation between the facts as alleged by the plaintiff and those sworn to by the defendant company's witnesses. It would appear that there had been some preliminary negotiations between the parties which were broken off, on the question of the purchase-price, and that shortly prior to the 29th November, at the instance of the president of the defendant company, one Vincent A. White, a new approach was made to the plaintiff by one Demers, a member of a company of real estate brokers who were acting for the defendant; and that as a result there was some discussion between the plaintiff and Mr. White. A meet-

ing was arranged at the office of the real estate brokers, W. H. Bosley & Company, between White, Mr. Keith (the company's solicitor), Demers, the agent from W. H. Bosley & Company, and the plaintiff. In the result, after some considerable discussion and negotiation, the offer to purchase which is the subject matter of this action was signed by both the plaintiff and the defendant company. It seems to be quite clear that it was drawn by the defendant company's solicitor and was signed by the plaintiff acting without legal advice.

Subsequent to the issue of the writ, and before the trial, Vincent A. White, the president of the defendant company, died. By the consent of the parties, his examination for discovery was read as his evidence *de bene esse*. This is the only available record of Mr. White's version of what took place between the parties at the time the contract was drawn up and executed and before and after. His evidence goes further than the plaintiff's in trying to set up more of a preliminary understanding between the defendant company and the plaintiff, but in my view it would be straining it beyond any reasonable limits to say it supports the view that there was any preliminary condition or material misrepresentation made by the plaintiff to White or the defendant company which would in any way justify the rescission or repudiation of this contract or the refusal of the relief asked.

And similarly in respect of the other defences pleaded by the defendant company. Mr. Roy, in his evidence, asserted that at no time did he ever suggest that he was willing to heat the building. On the contrary, he asserts that he made it quite plain that he was not prepared to heat. I accept and believe his evidence in this respect.

In respect of the allegation that the contract was incomplete with respect to material matters, such as the supply to the defendant of janitor and cleaning service, electricity, water, gas and elevator service, it may be observed first that what is sought to be specifically performed here is not the lease of the premises but the sale of the lands and premises to the plaintiff, which is in effect the other side of the contract than that which benefited the defendant. In point of fact the defendant has already enjoyed all it stipulated for, and much more, and up to the present has paid the plaintiff nothing for it. It may also be observed that there is nothing incomplete in the agreement for leasing.

None of the services mentioned is a necessary accompaniment to such a lease as was reserved by the defendant. It would appear that what the defendant did not stipulate for it was not entitled to receive from the plaintiff in any event. Surely the responsibility for these services falls squarely on the defendant, and the fact they were not provided for does not create ambiguity and uncertainty and incompleteness which would justify the refusal of the remedy for which the plaintiff sues. There was no obligation on the plaintiff to provide them.

These views, in my opinion, also apply to other matters raised by the defendant as to entry by the plaintiff on the premises, and as to fixtures.

And while, in my opinion, the clause which I first quoted from the contract is an answer to the contentions of the defendant, it must also be said that the evidence adduced did not show a set of facts which would justify giving effect to the various defences raised.

The defendant, however, in argument raised another defence in law. By the contract the date for the closing of the sale was the 29th January 1950. The writ was issued on behalf of the plaintiff on the 10th January 1950, some days before the time set out for completion had arrived. It is true that in a letter of 3rd December 1949 from the defendant's solicitors to those of the plaintiff it was stated that both parties were anxious to close this deal "this month", that is, December, and the suggestion was made that the transaction could be closed on the 31st of that month. There is no evidence, however, that this subsequent proposal was ever accepted by the plaintiff.

It is argued that the plaintiff by bringing this action elected to accept the repudiation of the contract by the defendant, and is now at best only entitled to damages. Reliance is placed in the rule first clearly enunciated in *Hochster v. De la Tour* (1853), 2 E. & B. 678, 118 E.R. 922.

It is also said that the fact that the plaintiff did nothing to complete the contract by way of tender after the repudiation is a bar to the granting of the relief asked. Dealing with this second point first, it is quite clear on the evidence, and indeed the plaintiff very frankly admits, that after the repudiation by the defendant the plaintiff did nothing by way of tender of purchase-money or documents prior to the issue of the writ, or

on the day fixed for closing the contract, that is, 29th January 1950. The plaintiff, however, stated under oath that he was at all times ready and willing to close and anxious to close, and I accept his statement in this regard. The whole course of action, of both the plaintiff and his solicitors, in my view, strengthens the credibility of this statement by him. In any event, on his evidence which I accept, I am satisfied that he was genuinely willing and ready to close the transaction at all times and in fact is still in that state of mind.

Fry on Specific Performance, 6th ed. 1921, states the rule at p. 435, para. 922, as follows: "With regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice, incumbent on him, when he seeks the performance of the contract, to show, first, that he has performed or been ready and willing to perform, the terms of the contract on his part to be then performed; and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted."

On the evidence it would seem clear that up to the time the defendant repudiated the contract the plaintiff had paid the deposit required and was in no way in default. Subsequently, in my view, he has been at all times ready and willing to complete. I do not think more is required of him. He has sworn that funds were available to his solicitors to complete, and even after the repudiation the plaintiff through his solicitors attempted for a short period to carry on to completion.

As Lord Mansfield said in *Jones et al. v. Barkley* (1781), 2 Doug. K.B. 684 at 694, 99 E.R. 434: "Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act." Reference may also be made to the decision of the majority in the House of Lords in the case of *British and Benningtons, Limited v. North Western Cachar Tea Company, Limited et al.*, [1923] A.C. 48, and in particular to the speech of Lord Atkinson in that case.

In this case, as I have already observed, I do not see what more the plaintiff could reasonably have done in the face of the defendant's repudiation.

Dealing with the first point last mentioned, that is, the argument advanced by the defendant that the plaintiff, by bringing his action when he did, elected to accept the repudiation of the contract by the defendant company, reference may be made to the rule stated in *Pollock on Contracts*, 13th ed. 1950, p. 218, as follows:

"The test laid down for one class of cases by the Sale of Goods Act, 1893, as we have just seen, is an application of the wider principle that a contract may be broken or discharged by repudiation, that is, by conduct manifestly repugnant to the due fulfilment of the terms. The good faith of agreements requires that, so long as anything remains to be done, each party should do what is reasonably necessary for carrying out the intention and should not do anything to hinder completion. There are three definite ways in which a party to a contract may violate this obligation, namely by an express refusal to perform his part, even if the performance is not yet due; by disabling himself from performance; and by preventing the other party from performing what is due from him.

"It is now well settled that if a promisor under a contract, even before the time for performance has arrived, declares his intention of not performing it, the promisee may treat this as an immediate breach of contract if he thinks fit, and bring his action accordingly [*Hochster v. De la Tour*, *supra*]. The reason for the rule may be put in various ways, but the really decisive ground is convenience. The alternative doctrine which appeared tenable till the middle of the nineteenth century was that the promisee's only election is to rescind the contract, thereby renouncing any claim for damages, or to ignore the refusal and await the time for performance thereby remaining bound to show himself ready and willing to perform at that time though he knows the promisor will not be. The refusal which under the modern rule may be treated as a present breach must, of course, be total, and the promisee's choice whether to treat the contract as rescinded by consent (which might sometimes though seldom be for his advantage) or proceed as for a breach must be clear and final [*Johnstone v. Milling* (1886), 16 Q.B.D. 460]. More-

over, the promisee must give evidence of his election to treat the contract as rescinded with all reasonable despatch [*Berners v. Fleming*, [1925] Ch. 264]. Apparently the rule was unwelcome to some of the judges, and its generality was affirmed only when, nearly twenty years after the leading decision, it was held applicable to the contract to marry [*Frost v. Knight* (1872), L.R. 7 Ex. 111]."

In *Frost v. Knight*, *supra*, at p. 112, Cockburn C.J., said:

"The cases of *Lovelock v. Franklyn*, 8 Q.B. 371 [115 E.R. 916], and *Short v. Stone*, 8 Q.B. 358 [115 E.R. 911], which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will at once lie. The case of *Hochster v. De la Tour*, 2 E. & B. 678 [118 E.R. 922]; upheld in this court in the *Danube and Black Sea Co. v. Xenos*, 13 C.B.N.S. 825 [143 E.R. 325]; went further, and established that notice of an intended breach of a contract to be performed in futuro had a like effect.

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* [*supra*] and *The Danube and Black Sea Co. v. Xenos* [*supra*], on the one hand, and *Avery v. Bowden*, 5 E. & B. 714 [119 E.R. 647]; *Reid v. Hoskins*, 6 E. & B. 953 [119 E.R. 1119]; and *Barrick v. Buba*, 2 C.B.N.S. 563 [140 E.R. 536], on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, if he pleases, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such

damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

It is, of course, quite clear that these decisions, and the rule that established them, arose in cases where all that was being considered was the common law right to damages for breach of contract. None of them deals with the situation where the equitable remedy of specific performance is sought, and until recently there seems to have been little authority in this respect. If, however, as Cockburn C.J. stated in *Frost v. Knight*, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, surely he is not deprived of his rights in equity. As the Chief Justice said at p. 114 of the opinion I have quoted:

"The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly."

It may, of course, be argued that by the bringing of the action for specific performance the party repudiating is deprived of the opportunity of taking advantage of any set of circumstances which might, in law, relieve him from performing the contract from which he is attempting to escape. This fact has not deterred the Courts from giving the wronged party an immediate right of action where damages are sought, and, in my opinion, there is no reason why there should be any distinction in dealing with an equitable remedy such as the one asked here. It is obvious, I think, that an action for specific performance does not put an end to the contract. The purpose of it is, of course,

to obtain the assistance of the Court in the performing of the contract. Moreover, if the party attempting to repudiate is given the opportunity of otherwise escaping from the consequences of the contract by virtue of something which may arise between the time of the repudiation and the time fixed for performance, and the Court insists on giving him that time, surely the Court is then assisting the wrongdoer to take advantage of his own wrongful act. If the wronged party is prepared to grant this advantage to the one repudiating, that is one thing, but I know of no case in equity where the Court has assisted a wrongdoer to reap the fruits of his own wrongdoing. The proper rule would seem to me to be to follow the procedure indicated by the common law decisions, that is, where there is an unequivocal repudiation, to permit the party seeking the completion of performance of the contract to bring his action at once. The matter is discussed by Williston on Contracts chiefly in relation to the common law decisions, and it is interesting to note that after a very critical examination of these cases by the learned author, in which the defects in the reasoning followed are thoroughly examined, he says in reference to the decision in *Hochster v. De la Tour*, *supra*, at p. 3710, rev. ed. 1937, para. 1314 (vol. 5):

"It has, however, settled the law in England that an action may be brought for an anticipatory repudiation, and that doctrine has been adopted in Canada, and in the United States, either by *dictum* or decision, both in the federal courts and in the courts of almost all the states in which the question has arisen."

In applying these principles to an action for specific performance of an agreement to sell land, Williston says in the same volume at pp. 3708-9, last part of para. 1311:

"Where the owner of specific property agrees to sell it at a future day, it is certainly much easier to imply a promise that he will not otherwise dispose of it in the meantime, than it is to imply a promise in every contract not only to do but to say nothing inconsistent with the principal promise. But would a court, it may be asked, grant specific performance on January 1, of a contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day? If such repudiation is an actual breach justifying an action at law, there seems no reason why a

suit in equity should not be maintainable. Certainly no decree would require performance before July 1, and it would at least be made clear that repudiation does not accelerate the obligations of a contract."

Since my consideration of the authorities I have referred to, my attention has been drawn to a judgment in our own Court of Appeal in the case of *Roberto v. Bumb*, [1943] O.R. 299, [1943] 2 D.L.R. 613. In that case it appears that the contract under consideration was for the sale of land, and was to be completed on the 15th October 1942. Before that date the defendant repudiated and an action for specific performance was commenced before the date of completion, on the 8th October in the same year. Dealing with the point raised on argument before the Court of Appeal in that case, that the action might be premature, Laidlaw J.A. said at p. 310:

"The respondent had a right to keep the contract open as a subsisting and effective contract and the sole question is whether he could properly maintain an action for specific performance before the time for performance by the appellant.

"It is clear that the renunciation by one of the parties before the time for performance has come does not of itself put an end to the contract, but it discharges the other, if he so chooses, and entitles him at once to sue for the breach. *Frost v. Knight*, [*supra*]; *Hochster v. De la Tour*, [*supra*]; *Dullea v. Taylor* (1873), 34 U.C.Q.B. 12; *Dalrymple v. Scott* (1892), 19 O.A.R. 477; *Neostyle Envelope Co. v. Barber-Ellis Limited* (1914), 6 O.W.N. 43, 16 D.L.R. 871, reversing 4 O.W.N. 1585, 12 D.L.R. 385; *The American National Red Cross v. Geddes Brothers*, 61 S.C.R. 143, 55 D.L.R. 194, [1921] 1 W.W.R. 185; *Martin v. Stout*, [1925] A.C. 359. The cause of action was not complete when the proceedings were commenced in the court, but when the matter came on for trial the appellant was in default and all conditions precedent to relief then existed. The respondent was prepared to show an existing contract, that he was willing and anxious to fulfil his obligations, and that the appellant was in default. I think that a court of equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it. Such a court would not look

favourably on such defence. Moreover no real benefit could be had by the appellant by giving effect to this objection to the proceedings, because the respondent would be free to commence a new action and to make the same claim as in the present one. The result would be multiplicity of proceedings concerning the matter and that should be avoided: The Judicature Act, R.S.O. 1937, c. 100, s. 15(h).

"Counsel argues that the respondent should be left to the remedy of damages. It has been said that where damages are sufficient compensation for breach of contract, specific performance should not be decreed. But I think that where the substance and essentials of a valid contract are sufficiently defined the Court ought to enforce actual performance of it unless there are special circumstances for not doing so. The affairs of modern business and society depend increasingly upon a strict fulfilment of obligations voluntarily undertaken by parties, and I think that a person seeking relief from his contractual burdens must clearly establish to the satisfaction of the Court such circumstances as render discharge by him unnecessary or inexpedient. That has not been done in this case."

The views expressed would seem to be in accord with those reached in the Restatement of the Law of Contracts as promulgated by the American Law Institute, s. 360, pp. 642-5 (vol. 2).

Under all these circumstances it would appear to me proper that the plaintiff should succeed. There will accordingly be judgment for a decree of specific performance and for damages incidental to the delay in performing the contract as set forth. There will be a reference to the Master at Toronto to take all necessary accounts and determine all necessary allowances and to determine the plaintiff's incidental damages, if any, by reason of the defendant's wrongful delay. The plaintiff will have his costs of the action and of the reference.

Judgment for plaintiff.

Solicitors for the plaintiff: Cameron, Weldon, Brewin & McCallum, Toronto.

Solicitors for the defendant: Chitty, McMurtry, Ganong & Keith, Toronto.

[FERGUSON J.]

Re Fox.

Wills—Mutual Wills—Agreement as to Alterations—Breach of Agreement by Survivor—Enforcement in Equity.

The principle laid down in respect of mutual wills in *Dufour v. Pereira* (1769), 1 Dick. 419 (as explained in *In re Oldham*; *Hadwen v. Myles*, [1925] Ch. 75 at 85; *Gray et al. v. Perpetual Trustee Company, Limited et al.*, [1928] A.C. 391 at 399; *Stone v. Hoskins*, [1905] P. 194, and *In re Hagger*; *Freeman v. Arscott*, [1930] 2 Ch. 190 at 195) is that if it is established that the mutual wills were made in pursuance of an agreement that they should be irrevocable after the death of one of the parties, and the survivor takes a benefit under the will, he will not be permitted to change his own will in breach of the agreement. (Many of the authorities are analyzed in *Re Kerr*, [1948] O.R. 543, affirmed [1949] O.W.N. 71). That principle should be extended to a case where the agreement is that if one party makes a change in a particular part of his will (having the right to make that change) the other party will make a corresponding change. In such circumstances, if the survivor does not in fact make the change, equity will treat the case as if he had done so, and will compel his personal representative to distribute the estate as if the change had been made.

A MOTION for the advice and direction of the Court.

2nd April 1951. The motion was heard by FERGUSON J. in Weekly Court at Toronto.

D. E. Calvert, for the applicant.

P. D. Wilson, K.C., Official Guardian, for Lance Sheppard, an infant.

P. J. Bolsby, K.C., for the guardian of the estate of Lance Sheppard and the administrator of the estate of Grace Fritts, deceased.

R. B. Law, K.C., and *D. F. Burt*, for Margaret T. Graham and Kathleen Harty.

W. J. McBurney, K.C., for Edward M. Whalen and Jack Whalen.

J. W. Butters, for Nina M. Bentley and Alexander B. Bentley.

20th April 1951. FERGUSON J.:—This is a motion brought by Guaranty Trust Company of Canada, the executor and trustee of the estate of Edith May Fox, and the surviving executor and trustee of the estate of Howard Augustus Fox, for advice and directions and interpretation of the wills of both decedents.

The testators were husband and wife, and resided at the city of Niagara Falls, Ontario. They were the joint owners of the hotel known as the Fox Head Inn in that city. On the 21st November 1942 they executed mutual wills. The effect of

both wills was that each spouse left to the other, after payment of debts, the whole of his or her estate subject to the payment of certain specific annuities, but in the event of the other dying first, the property, subject again to the payment of debts, etc., was devised and bequeathed to the executors, first to sell and convert into money, and then to invest and divide into eight shares, and to pay the income to certain named beneficiaries for life. Upon their deaths the share from which the income was to be paid was to pass in remainder as set out. The clause in the husband's will dealing with the division of the property among the beneficiaries is as follows:

"5. (c) To invest and keep invested the residue of my estate and to divide the residue of my estate into eight equal parts or shares, and to hold two of such shares in trust and to pay the income therefrom to Mrs. Paula Sheppard for and during her natural life; to hold one of such shares in trust and to pay the income therefrom to my sister-in-law, Mrs. Grace Frittz, for and during her natural life; to hold one of such shares in trust and to pay the income therefrom to my sister-in-law, Mrs. Nina M. Bentley, for and during her natural life; to hold one of such shares in trust and to pay the income therefrom to my sister, Mrs. Margaret T. Graham, for and during her natural life; to hold one of such shares in trust and to pay the income therefrom to my nephew, Edward M. Whalen, for and during his natural life; to hold one of such shares in trust and to pay the income therefrom to my friend Kathleen Harty, for and during her natural life. The share of capital of my estate so set aside to provide the life income for Paula Sheppard shall, on the death of the said Paula Sheppard, be delivered to her children then alive, share and share alike. The share of capital of my estate so set aside to provide the life income for Grace Fritts shall, on her death, be delivered to the children of Paula Sheppard then alive, share and share alike. The share of capital of my estate so set aside to provide the life income for Nina M. Bentley shall, on her death, be delivered to her children, share and share alike. Upon the death of any one of the following beneficiaries—Margaret T. Graham, Edward M. Whalen, Jack Whalen and Kathleen Harty—the share of capital of my estate so set aside for such beneficiary shall pass to the survivors of such beneficiary share and share alike."

I should interject at this point that the testator and testatrix left no issue. Nina M. Bentley, above mentioned, is a sister of Edith May Fox. Alexander B. Bentley is a son of Nina M. Bentley. Grace Fritts, mentioned in the clause, was a sister of Edith May Fox. She died on the 16th November 1949. Her daughter was Paula Sheppard, mentioned in the clause, who died on the 20th July 1948, leaving a son, Lance Sheppard, who was born on the 2nd October 1940. Margaret T. Graham, mentioned in the clause, is a sister of Howard Augustus Fox. Edward M. Whalen and Jack Whalen are nephews, presumably sons of a sister. Kathleen Harty, mentioned in the clause, is no relation.

The wording of each will was the same, with necessary changes in context, so that the result to the beneficiaries on the words of the wills is the same whichever died first. The terms of the respective wills were unaltered when the husband and wife entered into an agreement dated the 27th September 1943. As the answer to the first question asked turns substantially on the wording of the agreement, I set it out in full:

"THIS AGREEMENT made in triplicate this 27th day of September, A.D. 1943.

B e t w e e n :

"HOWARD AUGUSTUS FOX, of the City of Niagara Falls, in the County of Welland, Hotel Proprietor, hereinafter called the 'Husband'

OF THE FIRST PART

—and—

"EDITH MAY FOX, of the said City of Niagara Falls, Hotel Proprietress, hereinafter called the 'Wife'

OF THE SECOND PART

"WHEREAS the parties hereto are husband and wife and are jointly seized of certain assets possessed by them;

"AND WHEREAS the husband and the wife are desirous that in the event of the death of either of them the survivor shall have a life interest in the estate of the first decedent;

"AND WHEREAS for the purposes of carrying out this agreement, the parties agreed to make, and have now made, mutual Wills, each bearing date the 21st day of November, 1942.

"NOW THIS AGREEMENT WITNESSETH that in consideration of the premises the parties hereto agree as follows:

"1. The said last Will and Testament of each party hereto shall be irrevocable unless both parties hereto, by mutual consent, agree to revoke the said Wills save as hereafter provided in paragraph 2 hereof.

"2. Either party may, without the consent of the other party, change by codicil the beneficiaries of the annuities and/or the amount of the annuities given to each beneficiary in paragraph 4(b) of the said Wills provided the total annual payment remains in the sum of \$3,000.00.

"3. The wife may change paragraph 5(c) of her Will by dividing the four equal parts referred to therein held in trust for Mrs. Paula Sheppard, Mrs. Grace Fritts, Mrs. Nina M. Bentley by increasing the number of shares into which her half is divisible, and may change the beneficiary, in which event the husband shall change his will accordingly insofar as it affects the disposition of the half which it is intended shall go to such heirs as the wife may designate.

"4. The husband shall have the right to change paragraph 5(c) of his Will by dividing the four equal parts referred to therein held in trust for Mrs. Margaret T. Graham, Edward M. Whalen, Jack Whalen and Kathleen Harty by increasing the number of shares into which his half is divisible, and may change the beneficiary, in which event the wife shall change her Will accordingly insofar as it affects the disposition of the half which it is intended shall go to such heirs as the husband may designate.

"5. The husband hereby consents to the change made by the wife by her Codicil of even date adding paragraph 4(a) (a) to her said Will.

"6. The parties hereto, their heirs, executors, administrators and assigns, will do all such acts and execute such further assurances that may be necessary for the more perfect carrying out of this Agreement.

"IN WITNESS WHEREOF the parties have hereunto set their hand and seals the day and year first above written.

"SIGNED, SEALED and DELIVERED

In the presence of

D. E. CALVERT

EDITH MAY FOX (seal)

HOWARD A. FOX (seal)".

The husband, Howard Augustus Fox, did in fact alter clause 5(c) of his will by a codicil dated the 6th August 1946, by which he increased the share of his estate to his sister-in-law Mrs. Nina M. Bentley and to his friend Kathleen Harty and correspondingly decreased the shares to go to his nephews Jack Whalen and Edward M. Whalen. The clause, as altered by the codicil, reads as follows:

"To invest and keep invested the residue of my estate and to divide the residue of my estate into eight equal parts or shares and to hold two of such shares in trust and to pay the income therefrom to Mrs. Paula Sheppard for and during her natural life; to hold one of such shares in trust and to pay the income therefrom to my sister-in-law, Mrs. Grace Fritz, for and during her natural life; to hold one of such shares in trust and to pay the income therefrom to my sister-in-law, Mrs. Nina M. Bentley, for and during her natural life; to hold one and one-half of such shares in trust and to pay the income therefrom to my sister, Mrs. Margaret T. Graham, for and during her natural life; to hold one-half of such shares in trust and to pay the income therefrom to my nephew, Edward M. Whalen, for and during his natural life; to hold one-half of such shares in trust and to pay the income therefrom to my nephew, Jack Whalen, for and during his natural life; to hold one and one-half of such shares in trust and to pay the income therefrom to my friend, Kathleen Harty, for and during her natural life. The share of capital of my estate so set aside to provide the life income for Paula Sheppard shall, on the death of the said Paula Sheppard, be delivered to her children then alive, share and share alike. The share of capital of my estate so set aside to provide the life income for Grace Fritts shall, on her death, be delivered to the children of Paula Sheppard then alive, share and share alike. The share of capital of my estate so set aside to provide the life income for Nina M. Bentley shall, on her death, be delivered to her children, share and share alike. Upon the death of any one of the following beneficiaries—Margaret T. Graham, Edward M. Whalen, Jack Whalen and Kathleen Harty—the share of capital of my estate so set aside for such beneficiary shall pass to the survivors of such beneficiary share and share alike."

Howard Augustus Fox died on the 9th May 1947. Edith May Fox died on the 24th September 1948, without having altered her will in accordance with the codicil made by her husband as she undertook to do by para. 4 of the agreement of the 27th September 1943.

The first question submitted is as follows:

“(a) Whether an Agreement made between the said Howard Augustus Fox and the said Edith May Fox, dated September 27th, 1943, is binding upon Guaranty Trust Company of Canada, the Executor and Trustee of the said Edith May Fox?

“(b) If the answer is ‘Yes’, should the said Executor and Trustee make distribution as if paragraph 5(c) of the last Will and Testament of the said Edith May Fox had been changed in order to conform to the terms of the said Agreement?

“(c) If the answer to 1(b) is ‘No’, by what procedure is the said Executor and Trustee to give effect to the said Agreement?”

The basic principles of our modern law governing the interpretation of joint or mutual wills are to be found in the judgment of Lord Camden in *Dufour v. Pereira* (1796), 1 Dick. 419, 21 E.R. 332. That was a case of a joint will—made in one document. Although that case has been distinguished from time to time on the facts, it has stood as unquestioned authority, as far as it goes, from that day to this. Lord Camden’s judgment has been interpreted on numerous occasions. Many of the cases referring to or interpreting the judgment are analyzed in the judgment of Schroeder J. in *Re Kerr*, [1948] O.R. 543, [1948] 3 D.L.R. 668, affirmed [1949] O.W.N. 71, [1949] 1 D.L.R. 736. In his judgment, as more fully set out in 2 Harg. Jurid. Arg. at 310, Lord Camden said: “The parties by the mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in the manner therein mentioned . . . he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.”

Astbury J. in *In re Oldham; Hadwen v. Myles*, [1925] Ch. 75 at 85, said that the law as so stated by Lord Camden was based on his findings of fact that a certain and unequivocal trust was created by the two parties who executed the mutual wills. Much the same interpretation was placed upon the judgment by Viscount Haldane in *Gray et al. v. Perpetual Trustee Company, Limited et al.*, [1928] A.C. 391, [1928] 3 W.W.R. 104, where he said: “. . . the conclusion reached was that if there was in point of fact an agreement come to that the wills should not be revoked after the death of one of the parties without mutual consent, they were binding.”

Having in mind the basic finding of fact above referred to, there are two restatements of the law laid down in *Dufour v. Pereira*, *supra*, to which I wish to refer.

Firstly, as stated in the headnote to *Stone v. Hoskins*, [1905] P. 194: “Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract. . . .”

Secondly, there is the interpretation of Clauson J. in *In re Hagger; Freeman v. Arscott*, [1930] 2 Ch. 190 at 195:

“. . . the position as regards that part of the property which belongs to the survivor is that the survivor will be treated in this Court as holding the property on trust to apply it so as to carry out the effect of the joint will. . . . Lord Camden has decided that if the survivor takes a benefit conferred on him by the joint will he will be treated as a trustee in this Court, and he will not be allowed to do anything inconsistent with the provisions of the joint will.”

There can be no question in this case as to the arrangement; it is set out in plain words in the agreement signed by the parties. There is also no doubt that the wife took a benefit under the husband's will after notice of the change made by the husband. That change, I think, must have come to her attention when she applied for probate of her husband's estate. It was argued strenuously by counsel for the persons affected

adversely by the alteration made by the codicil to the husband's will that that change did not obligate the wife to make a corresponding change in her will without a request by the husband to the wife that she should make such change in her will. That argument has no merit. The wife had signed the agreement. She had notice of the alteration made by the husband when she applied for probate of his estate, if not before, and was bound to carry out her contract; no further or other request was necessary.

This, however, is not a case of an alteration of the will by a survivor. The problem is: Do the same results follow from the breach of the agreement to make the change she agreed to make as if the altered terms had been in the will and she had altered it after her husband's death? Does her personal representative hold the property in trust to perform the contract which she executed? I think the answer must be that the personal representative does so hold the property. There is no doubt that a party to an agreement to make a will in his favour can enforce that agreement and the testator's assets are bound by such agreement: *Foster v. Royal Trust Company*, [1950] O.R. 673, [1951] 1 D.L.R. 147; 34 Halsbury, 2nd ed. 1940, pp. 15-6.

There is a maxim that equity looks on that as done which ought to have been done, or which has been agreed or directed to be done. The meaning of this maxim is that equity will treat the subject-matter of a contract, as to its consequences and incidents, in the same manner as if the act contemplated by the parties had been completely executed and will act in favour of those persons entitled to the performance of the contract so that no party to the agreement shall suffer from the delay and laches of the defaulter: *Snell's Principles of Equity*, 23rd ed. 1947, p. 21. Nor are we concerned with the fact that the persons who now seek the declaration are not parties to the contract, because equity will follow the legal estate and decree that the person in whom it is vested execute the trust, and the *cestuis que trust* or any one of them are entitled to proceed against the trustee or the person in whom the property is vested to compel him to the execution of the trust created by the agreement.

The answer therefore to the question whether the applicant in its capacity of executor of the estate of Edith May Fox is

bound by the agreement is "yes". The answer to the second part of the first question must also be "yes".

The second question asked is as follows:

"(a) Whether the words 'survivors of such beneficiary', in paragraph 5(c) of the last Will and Testament of the said Edith May Fox should be interpreted as first, 'survivor or survivors of such beneficiaries' or, secondly, as 'heirs or personal representatives of such beneficiary',

"(b) If the first is correct, whether there is an intestacy with respect to the share of capital on which the last survivor of the class of four has the income for life?"

The last sentence of clause 5(c) of the husband's will and the wife's will reads as follows: "Upon the death of any one of the following beneficiaries—Margaret T. Graham, Edward M. Whalen, Jack Whalen and Kathleen Harty—the share of capital of my estate so set aside for such beneficiary shall pass to the survivors of such beneficiary share and share alike."

I am of the opinion that this clearly means survivor or survivors of such beneficiaries, that is to say, if Margaret T. Graham dies first, the share of capital so set aside for that beneficiary, and out of which the income is paid to her, passes to Edward M. Whalen, Jack Whalen and Kathleen Harty, share and share alike, and not to the next-of-kin of Margaret T. Graham. Question 2(a) should be answered accordingly. No disposition is made of the share from which income is paid to the person who dies last. It follows that that share passes as on an intestacy of Edith May Fox.

Costs of all parties out of the estate of Edith May Fox, those of her executor on a solicitor and client basis.

Judgment accordingly.

Solicitors for the applicant: Martin, Calvert & Matthews, Niagara Falls.

Solicitors for Margaret T. Graham and Kathleen Harty: Raymond, Spencer, Law & MacInnes, Welland.

Solicitors for Edward M. Whalen and Jack Whalen: McBurney & Durdan, Niagara Falls.

Solicitor for Nina M. Bentley and Alexander B. Bentley: J. W. Butters, Niagara Falls.

[COURT OF APPEAL.]

Rex v. Lebrun.

Evidence—Competency of Witnesses—Child of Tender Years—Necessity for Inquiry before Administration of Oath—Nature of Inquiry to be Made.

Before an oath is administered to a child of tender years called as a witness, the presiding judge or magistrate must satisfy himself, by appropriate inquiry, that the child understands both the nature and the moral obligation of an oath. *Rex v. Brasier* (1779), 1 Leach 199; *Rex v. Moscovitch* (1924), 18 Cr. App. R. 37; *Rex v. Surgenor* (1940), 27 Cr. App. R. 175 applied; *Rex v. Antrobus* (1947), 63 B.C.R. 372, agreed with.

Evidence—Complaints in Sexual Cases—Principles and Extent of Admissibility — Repeated Complaints — Evidentiary Value — Necessity for Adducing Evidence of Complainant before Evidence of Complaint.

On a trial for a sexual offence, evidence of a complaint is admissible, whether or not the consent of the complainant to the commission of the offence is material, and whether the complainant is female or male (with a query as to the age-limit in the case of a male), provided the complaint was not elicited by questions of a leading, inducing or intimidating character, and was made at the first opportunity that reasonably presented itself. *Reg. v. Lillyman*, [1896] 2 Q.B. 167; *Rex v. Osborne*, [1905] 1 K.B. 551; *Rex v. Camelleri*, [1922] 2 K.B. 122; *Rex v. Wannell* (1922), 17 Cr. App. R. 53, applied.

In considering whether or not the making of a complaint has been induced by improper questioning, the Court should not invoke the rules applicable to confessions. Questions which tend only to elicit the truth are not objectionable, but questions suggestive of the illegal acts, or that tend to induce or intimidate the complainant to accuse a man, are objectionable, and a complaint made as a result of such questions should not be admitted.

A second or subsequent complaint, if it is distinct and separate from the first complaint made, is not admissible in evidence, however short the interval of time between the two. *Rex v. Lee* (1911), 7 Cr. App. R. 31; *Rex v. Calhoun*, [1949] O.R. 180, considered.

Since evidence of a complaint is confirmatory evidence only, and can be considered only in connection with the credibility of the complainant, it should not be adduced or admitted until after the complainant has given his or her evidence. *Reg. v. Guttridges, Fellowes, and Goodwin* (1840), 9 C. & P. 471; *Reg. v. Lillyman*, *supra*, applied.

AN APPEAL from conviction. The accused appealed in writing, and counsel was appointed for him by the Court.

2nd April 1951. The appeal was heard by ROACH, HOGG and BOWLBY JJ.A.

P. B. C. Pepper, for the accused, appellant: 1. The little boy, Gary Whittington, was sworn before any inquiry was made as to his capacity to take the oath. Some questions were asked by Crown counsel, but not until after he had been sworn. At common law a child under 7 years of age could not be sworn, but it was laid down in *Rex v. Brasier* (1779), 1 Leach 199, 168

E.R. 202, that a child of tender years could be sworn, provided it appeared that he understood the nature and consequences of an oath. As to the nature of the inquiry that should be made I refer to *Sankey v. The King*, [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245; *Rex v. Pawlyna*, [1948] O.R. 226, 91 C.C.C. 50, 5 C.R. 158, [1948] 2 D.L.R. 327.

Even if the examination as to the child's capacity to take the oath could properly be made after the oath had been administered, the examination in this case was wholly insufficient, because it showed no appreciation of the religious significance of an oath.

2. It was improper to adduce the evidence of the brother and mother before that of the little boy himself. [ROACH J.A.: Apart from that, it is questionable whether the mother's evidence was admissible at all, since it amounts to evidence of a second complaint.] Quite so.

3. There is no authority in this jurisdiction for the admission of evidence of a complaint by a male person. It was decided in *Rex v. Camelleri*, [1922] 2 K.B. 122, 16 Cr. App. R. 162, that such evidence was admissible in that case, but no general principle was laid down. I refer to *Rex v. Elliott*, 62 O.L.R. 1, 49 C.C.C. 302, [1928] 2 D.L.R. 244. Evidence of complaints is admitted in rape cases primarily to show the consistency of the prosecutrix's conduct and to negative consent. Here the consent of the little boy is wholly immaterial.

4. If the child's evidence had been admitted unsworn there would have had to be corroboration, and there is not enough in this record. The accused's statement when the child appeared at his door were not an admission of anything.

C. P. Hope, K.C., for the Attorney-General, respondent:

1. The evidence of this boy would clearly have been admissible without any oath. The fact that the inquiry was made after he was sworn is immaterial, because the necessary facts came to light to make it admissible as unsworn evidence.

2. There is ample corroboration in the accused's exclamation when he saw the boy, and also in the close correspondence between the boy's description, to the police officer, of the accused's house and clothing and what the police found when they went to the house.

3. The complaint was admissible under the authority of *Rex v. Camelleri, supra*. The complaint to the mother was merely a continuation of that started to the brother.

P. B. C. Pepper, in reply.

Cur. adv. vult.

8th May 1951. ROACH J.A. agrees with HOGG J.A. and with BOWLBY J.A.

HOGG J.A.:—The information and complaint against the appellant, Victor Lebrun, sets out that on the 20th November 1950, at the city of Galt, he did indecently assault another male person contrary to s. 293 of The Criminal Code, R.S.C. 1927, c. 36. Upon his trial for the aforesaid offence before Magistrate H. R. Polson, the appellant was convicted and sentenced to a term of five years' imprisonment.

Section 293 of the Code reads: "Every one is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person."

The indecent assault was alleged to have been committed upon Gary Whittington, a boy 6 years of age, who, within a short time after the assault, informed his brother Kenneth, a youth 17 years of age, and his mother, of the particulars of what he said the appellant had done to him. Mrs. Whittington at once communicated with the police. Both Kenneth Whittington and Mrs. Whittington gave evidence of the complaint at the trial of the appellant.

The oath was administered by the magistrate to the boy and his testimony was heard at the trial.

The grounds of appeal advanced by counsel on behalf of the appellant are:

(1) That sufficient inquiry was not made by the magistrate, before the oath was administered to the child Gary Whittington, as to whether he knew the nature of an oath.

(2) That the evidence of the complainant's brother and mother was not admissible.

(3) That there was no evidence that corroborated the complainant's testimony.

With reference to the first ground of appeal, namely, that the oath should not have been administered to Gary Whittington before it was made apparent that he sufficiently understood its nature, the principle seems to have been established as long ago as the 18th century by the Courts in England that an infant of tender years may be sworn as a witness in a criminal case provided that such infant appears sufficiently to understand the nature and moral obligation of an oath: Archbold's Criminal Pleading, Evidence and Practice, 31st ed. 1949, p. 459. The learned author gives as authority for the above-stated proposition several cases dating back as far as the year 1775, one of them being *Rex v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. In his reference to this case the learned author of Best on Evidence, 12th ed. 1922, at p. 141, regards it to be the leading case on the subject and to have settled the modern law and practice relative to the admissibility of the evidence of a child of tender years. In the *Brasier* case it was held that an infant, though under the age of 7 years, may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequence of an oath: "... their admissibility depends upon the sense and reason they [infants] entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court". The subject is also discussed in Phipson on Evidence, 8th ed. 1942, p. 446.

That this rule is still to be followed is shown by the judgments in several recent cases. In *Rex v. Moscovitch* (1924), 18 Cr. App. R. 37, Horridge J. said that the question was "whether or not the child knew the nature of an oath". In *Rex v. Surgenor*, 27 Cr. App. R. 175, [1940] 2 All E.R. 249, it was held that where a child of tender years appears as a witness it is the duty of the presiding judge to satisfy himself whether the child is or is not capable of being sworn.

An exhaustive inquiry into this subject is to be found in the judgment of the Court of Appeal of British Columbia delivered by Mr. Justice Robertson in *Rex v. Antrobus*, 63 B.C.R. 372, 87 C.C.C. 118, 3 C.R. 357, [1947] 1 W.W.R. 157, [1947] 2 D.L.R. 55. The conclusion at which the Court arrived is expressed in the headnote of the case in the Canadian Criminal Cases, which reads in part:

"No presumption exists as to the competency of a child under 14 years of age to be sworn as a witness but competency in such case must be shown, and for this purpose it is necessary for the trial Judge to satisfy himself by an enquiry (which may be brief) that a child of tender years understands the nature of an oath and also the consequences of an oath."

Mr. Justice Robertson said at p. 378, after reviewing the cases cited by him:

"However, all these cases go to show that before an infant was allowed to take an oath he was examined as to his religious belief and the different consequences which would arise between telling the truth and telling a falsehood. . . . The first thing necessary to show that a child of tender years is competent to give evidence under oath is that the child understands the nature of an oath. If it does not do this, then it is unnecessary to consider the further question as to whether or not the child understands the consequences of an oath. Even if it can be said, as the learned judge said in *Reg. v. Holmes* [(1861), 2 F. & F. 788, 175 E.R. 1286], that the question as to whether or not a child understood the nature of an oath was so complicated that nine out of ten children could not answer it, yet that question must be put to a child by a judge under section 16 of the Evidence Act, who, before he can allow the child to give unsworn evidence, must come to the conclusion that the child does not understand the nature of an oath. In coming to a conclusion one way or the other, he exercises his discretion judicially and upon reasonable grounds—see *Sankey v. The King*, [*infra*]."

In the appeal now under consideration the infant complainant was sworn by the presiding magistrate before any inquiry was made by him as to his understanding of the nature and consequences of an oath. After the oath was administered to the child counsel for the Crown put the following questions to him:

"Q. Do you go to school? A. Yes.

"Q. What school do you go to? A. St. Mary's.

"Q. This is a separate school? A. Yes.

"Q. Is this your first year or second? A. First year.

"Q. You are in the First Book, are you? A. Yes.

"Q. Do you know what it means to tell a lie? A. Yes.

"Q. What happens to boys and girls who tell lies? A. They get put in jail.

"Q. Do you always tell the truth? A. Yes."

If this inquiry had been made by the magistrate before he administered the oath to the witness, it was, in my opinion, sufficient to establish that the child appreciated the duty cast upon him of telling the truth, but the inquiry does not show that the boy had an understanding of the nature of the oath or its consequences.

When the evidence of a child is tendered under s. 16 of The Canada Evidence Act, R.S.C. 1927, c. 59, which permits, under certain conditions, unsworn testimony to be given, it has been held by the Supreme Court of Canada in *Sankey v. The King*, [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245, that the presiding magistrate or judge must satisfy himself by appropriate inquiry as to the capacity of a child offered as a witness in regard to his or her comprehension of the meaning, effect and sanction of an oath and also satisfy himself of the intelligence of the child and his appreciation of the duty of speaking the truth. Anglin C.J.C. said with reference to a child's understanding of the oath, that "A very brief inquiry may suffice to satisfy the judge on this point".

One of the essential requirements provided for the protection of one on trial for an alleged criminal offence against a child of tender years was not satisfied in the trial of the appellant and, such being the case, I think the appeal must be allowed and there must be a new trial.

A remaining ground advanced in support of the appeal was with respect to the admissibility of certain evidence, and raises an important question in the administration of the criminal law. It has been fully and clearly discussed in the judgment of my brother Bowlby, which I have had the privilege of reading and with which I am in agreement.

BOWLBY J.A.:—I have had the privilege of reading the judgment of my brother Hogg, and fully concur in the conclusion arrived at by him that there must be a new trial, and in his reasons for so stating. He has dealt with the first ground advanced by counsel for the appellant upon which a new trial is sought. It is my opinion that the rest of the evidence adduced by the prosecution should also be considered, as I have arrived at

the conclusion that the whole trial was so unsatisfactory that it amounted to a mistrial.

At the trial the first witness called by the prosecution was Kenneth Whittington, the 17-year-old brother of the 6-year-old Gary, to whom Gary made a complaint shortly after the alleged offence. The witness gave in evidence the complete lurid details of what Gary had told him of the alleged offence. The witness then stated in evidence: "I knew it was against the law and I told my brother to tell my mother." When asked how much later Gary told his mother, the witness replied: "Five minutes at the most."

The mother was next called by the prosecution. She stated that she was at the home of a neighbour having a cup of tea when her three sons Kenneth, Keith and Gary arrived. The mother then testified as follows:

"Kenny said, 'look, mamma, if Gary tells you what he told me I think you better phone the police.' I said, 'tell me, Gary.' I thought he went in a store and stole something. I said, 'what did you do, Gary?' . . .

"I said, 'Gary what did you do?' Kenny said, 'it was not what Gary done, it was what someone did to him.' So I said, 'tell me, Gary.' He hesitated on account of my neighbours. I said, 'Peggy wants to hear it, too.' So he started to tell me and he told the identical story as what Kenny just finished telling [referring to Kenneth's evidence in the witness-box], and he used the same terms, too."

The mother then testified that she telephoned the police; that the police arrived in what "seemed like hours but may have been 10 or 15 minutes", and that Gary then told the police the same story.

The next witness was the police officer, who stated that Gary told him of the incident already related by the two previous witnesses, and then the police officer proceeded to give in evidence what the boy Gary told him of the location of the house, and the description he gave of it, exterior and interior, and of the clothing worn by the man who had allegedly committed the assault. The officer then testified that the description given to him by the boy was identical with the house and clothing of the prisoner and that upon arrival the boy immediately identified the prisoner. All the above evidence was adduced before the

boy Gary was called as a witness. The defence offered no evidence.

It is contended that the evidence of the mother and brother was not admissible.

It may be well to consider first, as briefly as possible, the history of the law in regard to the admissibility of what are referred to in criminal evidence as "complaints".

For many years in the history of English jurisprudence, the only evidence permitted by a third person in regard to so-called "complaints", not made in the presence of the prisoner, was to permit such third person to testify that the prosecutrix had made a complaint and had named the accused person, but such witness was not, as a rule, permitted to state in evidence the details of such complaint, or in other words, what the prosecutrix had said when making such complaint. Up to 1896 the law in England in this regard was in a somewhat controversial state. In *Reg. v. Lillyman*, [1896] 2 Q.B. 167, the Court for Crown Cases Reserved in England settled the law and extended the rule of admissibility by permitting the person to whom the complaint was made to state in evidence full details of the complaint made by the prosecutrix. The Court held that the evidence was admissible not as evidence of the facts of the offence but only to enable the jury to decide whether the conduct of the prosecutrix following the alleged offence was consistent with her evidence in the witness-box negating her consent and affirming that the acts complained of were against her will. The judgment of the Court was delivered by Hawkins J. and at pp. 170 *et seq.* a most enlightening and clear history of the principle as of that date is given.

At that time and up to 1905 such evidence had been admitted only where the charge against the prisoner was rape, or a kindred offence. In *Rex v. Osborne*, [1905] 1 K.B. 551, the prisoner was charged with indecent assault on a girl under the age of 13 years, whose consent to the act was therefore immaterial. The Court for Crown Cases Reserved further extended the rule of admissibility to cases in which non-consent of the prosecutrix was not an element of the offence charged, and held that such evidence was corroborative of the prosecutrix's credibility, but not corroborative of the facts of the alleged offence. The Court also dealt with two other phases of great importance. It held that to be admissible the complaint (1)

must not have been elicited by questions of a *leading, inducing or intimidating character*, and (2) must have been made at the first opportunity after the offence which reasonably offered itself. The judgment of the Court (Lord Alverstone C.J. and Kennedy, Ridley, Channell and Phillimore JJ.), delivered by Ridley J., is also most instructive upon the principle of admissibility of "complaint" evidence.

Up to 1922 the rule admitting so-called complaints had been dealt with by the Courts only as applicable to sexual offences against females. In *Rex v. Camelleri*, [1922] 2 K.B. 122, 16 Cr. App. R. 162, the Court of Criminal Appeal extended the rule to sexual offences against males, leaving open the question of the age-limit of male complainants. The prisoner was indicted at the Liverpool assizes for having committed an unnatural offence with one Arlett, a boy of 13, and with having committed acts of gross indecency with him; in further counts he was charged with having indecently assaulted one Bishop, a boy of 15, and with having committed an act of gross indecency with him. The prisoner pleaded not guilty. During the trial evidence was tendered for the prosecution that shortly after the act complained of Bishop made a complaint to his parents, and of the particulars of that complaint. Counsel for the prisoner objected to its admissibility, contending that evidence of that nature was admissible only in prosecutions for sexual offences against women and girls. Roche J. admitted the evidence. The prisoner appealed and the appeal was heard by Lord Hewart C.J. and Greer and Acton JJ. In delivering the judgment of the Court, Lord Hewart, at p. 125, after discussing the judgments in *Reg. v. Lillyman*, *supra*, and *Rex v. Osborne*, *supra*, said:

"But when the facts of those cases are looked at it is apparent that the antithesis which the judges had in their minds was not that between cases in which a complaint of this nature is made by a female and cases where the complaint is made by a male person, but was the antithesis between sexual offences on the one hand and non-sexual offences on the other. So far as this country is concerned there is no authority which decides that the mere fact that the complainant is a male person renders the complaint or the particulars of the complaint inadmissible. The question does not seem to have been considered by the High Court. In New Zealand, on the other hand, the fact and

particulars of a complaint by a male person have been held admissible. No doubt there is force in the suggestion that probably little attention would or should be paid to a complaint by an abandoned male person of mature years, but perhaps that observation goes rather to the weight, than to the admissibility, of the complaint. In this case, where the complaint was by a young boy, we are of opinion that the judge rightly admitted evidence of the fact and particulars of the complaint. Hereafter, it may be, the limits of this matter may have to be considered."

In a later case, *Rex v. Wannell* (1922), 17 Cr. App. R. 53, the Court of Criminal Appeal in England held that a complaint made by a 19-year-old boy was admissible.

The rule laid down by Lord Chief Justice Hewart in the *Camelleri* case should be accepted as the law of Canada, with a query as to the age-limit of the complainant. Evidence of a complaint in sexual offences, whether or not consent of the complainant to the commission of the offence is material, and whether the complainant is female or male, is, in my opinion, admissible in Canada subject to what I shall hereafter say in regard to such complaint having been elicited by questions of a *leading, inducing or intimidating character*, and as to the admissibility of any complaint other than the first one. As to complaints made by male persons, the age of such male person should undoubtedly affect the admissibility of the complaint. No doubt the question will in due course come before the Court for further decision. Each case will have to be dealt with according to its particular facts.

In considering whether or not a complaint has been elicited by questions of a leading, inducing or intimidating character, the Court should not, in my opinion, invoke the well-known principles which are considered when deciding as to the admission or rejection of a confession made by a prisoner. Questions which tend only to elicit the truth from a person who has been sexually assaulted are not objectionable. Questions, however, which are suggestive of the illegal acts, or which tend to induce such person to accuse a man, or intimidate such person into accusing a man, are objectionable and a complaint made as a result of such questions should not be admitted.

I have given a great deal of consideration to another important phase of the admissibility of complaints, namely,

whether or not a subsequent complaint, distinct and separate from a first complaint made, however short the interval of time may be between the two complaints, is admissible. One would have thought that the matter would have been considered many times by the Courts in England and Canada. The only case which I have been able to find in England in which the question is discussed is *Rex v. Lee* (1911), 7 Cr. App. R. 31. The prisoner was convicted of indecent assault. The prosecutrix, whose thumb had been cut in the struggle, made a complaint to the prisoner's mother forthwith. She then went home and told her father about the cut thumb. Then she went to a Mrs. Mussett, to whom she told the whole story of the indecent assault. The prisoner's mother was not called by the prosecution, nor was the prosecutrix's father. Upon cross-examination of the prosecutrix, who gave evidence first, the prosecutrix admitted to the prisoner's counsel that she had told the same story to the prisoner's mother which she had told to Mrs. Mussett. Mrs. Mussett was called by the prosecution to give in evidence the complaint which had been made to her. The prisoner's counsel objected on the grounds that on the prosecutrix's testimony she had previously made the same complaint to the prisoner's mother, and that therefore the second complaint made to Mrs. Mussett should not be admitted. Hamilton J., in delivering the judgment of the Court of Criminal Appeal (Darling, Lord Coleridge and Hamilton JJ.), said: "It must depend on the circumstances of each case whether it can be said that the complaint was made on the first reasonable opportunity which offers itself. But here we think that both the first complaint was in fact put in evidence on the cross-examination, and the second complaint was available."

The question was considered by this Court in *Rex v. Calhoun*, [1949] O.R. 180, 93 C.C.C. 289, 7 C.R. 306. The prisoner was convicted of rape. The prosecutrix, immediately after the offence had been committed, went to the room occupied by her and her room-mate for sleeping purposes. Spontaneously the prosecutrix complained to her room-mate, and while she was relating her story to her room-mate a Mrs. Carrier, occupant of an adjoining room, came into the room occupied by the two young women. In her presence the prosecutrix continued with her complaint already started to her room-mate, no doubt re-

peating for the benefit of Mrs. Carrier part of what she had already told her room-mate. The prosecution called first the room-mate to give evidence of the complaint and then Mrs. Carrier. It was contended by prisoner's counsel that Mrs. Carrier's evidence was not admissible because the complaint to her was not the first complaint. This Court held that Mrs. Carrier's evidence was admissible as there were not two distinct and separate complaints, but what the room-mate and Mrs. Carrier heard was in effect one continuous complaint. It is clear upon reading the judgment that this Court would have held otherwise had the prosecutrix, having finished her complaint to her room-mate, gone to Mrs. Carrier's room and made the same complaint to her.

I am of opinion that in Canadian courts a complaint made subsequent to a first complaint, so long as it is separate and distinct from the first complaint, is not admissible. If the Court of Criminal Appeal in England in *Rex v. Lee, supra*, intended to hold otherwise, I do not agree.

In my opinion a trial Court should not admit evidence of a complaint until satisfied, (1) that it was made at the first opportunity which reasonably presented itself, and was not one subsequent to and separate and distinct from the first complaint, and (2) that it was not elicited by questions of a *leading, inducing or intimidating character*. The question of admissibility is one of law.

Judges and magistrates, as well as Crown officers, should ever be on the alert in cases of this kind to see that there is no ground for suspecting the good faith of mothers or others putting forward a charge. The possibility of inciting a child or other person to make such a charge must ever be jealously guarded against. When such evidence is admitted the Court, if trying the case without a jury, should ever keep in mind, and, if trying it with a jury, should carefully instruct the jury, that such evidence is not evidence which in the slightest degree corroborates the complainant as to the facts of the offence charged, but can merely be used to assist in determining whether or not the complainant is a credible witness.

Before dealing with the case at bar, there is another phase of the principle being discussed which I think should be mentioned. Evidence of so-called complaints is *confirmatory* evi-

dence only. As already stated it is admitted only for that purpose and can be considered by the trial tribunal only as of assistance in coming to a conclusion as to the credibility of the complainant. As such it is, in my opinion, improper to adduce such evidence before the complainant has given his or her testimony. In *Reg. v. Guttridges, Fellowes, and Goodwin* (1840), 9 C. & P. 471, 173 E.R. 916, the evidence of the complaint was not admitted at all because the complainant did not give evidence. In the *Lillyman* case, *supra*, Hawkins J. says at p. 170: "It [a complaint] clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted."

I now deal with the case under consideration. The evidence of Kenneth Whittington, after careful investigation by the trial Court as to what he said to his young brother, may well be admissible. The evidence of the mother cannot, in my opinion, be admitted for reasons already stated, nor can the police officer relate what the boy Gary said to him when the accused person was not present as such evidence is clearly hearsay. It was improper also, in my opinion, to call evidence as to a complaint before the boy gave his account of what happened.

It was contended on appeal by counsel for the Crown that statements made by the boy in his complaint and later to the officer describing the prisoner's house and clothing, which subsequently proved to be correct descriptions, served as corroboration, and counsel referred us to a judgment of the Supreme Court of Canada, *Shorten v. The King*, 57 S.C.R. 118, [1918] 3 W.W.R. at 9, 49 D.L.R. 591. With this contention I cannot agree. I do not take that meaning from the judgment of the Supreme Court. In *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760, the Supreme Court came to a different conclusion. In *Rex v. Whitehead*, [1929] 1 K.B. 99, 21 Cr. App. R. 23, the Court of Criminal Appeal presided over by Lord Hewart C.J., who delivered the judgment, held (as stated in the headnote):

"Any inference as to what the girl told her mother could not amount to corroboration of the girl's story, as it proceeded from the girl herself and the girl could not corroborate herself."

This, in my opinion, is a proper statement of the law, and here, as already stated, the police officer's evidence in that regard was not admissible.

Evidence of the accused's behaviour when confronted with and identified by the complainant may be such that inferences corroborative of the complainant's story may be drawn: *Hubin v. The King, supra*. I make no further comment in regard to corroboration as the trial tribunal, should another trial be had, will have to decide upon the evidence then given whether or not the boy's statement of what happened is corroborated.

For the above reasons, as well as those stated by my brother Hogg, the conviction must, in my opinion, be quashed, and a new trial had.

New trial ordered.

[SCHROEDER J.]

**Beaver Lamb and Shearling Company Limited v. Sun Insurance
Office of London England, et al.**

*Practice—Writ of Summons—Service out of Jurisdiction—When Issue of
Concurrent Writ to be Permitted—One Defendant in Ontario, One
Outside—Alternative Claims—Distinct Causes of Action—Joinder—
Rules 25(1)(i), 67.*

The governing principle to be borne in mind in all cases where leave is sought to issue a writ for service out of Ontario is that no command should issue from the Sovereign to the subject of another State, calling upon him to submit himself to the jurisdiction of the Ontario Courts, save in the clearest possible case. *Brenner v. American Metal Co.* (1920), 48 O.L.R. 525; 50 O.L.R. 25, applied; *George Monro, Limited v. American Cyanamid and Chemical Corporation*, [1944] K.B. 432 at 437; *Empire-Universal Films Limited et al. v. Rank et al.*, [1948] O.R. 235 at 250, quoted. The power of the Court to give such leave is a discretionary one, to be exercised according to a sound judicial discretion.

The guiding and determining principle to be applied where a plaintiff invokes Rule 25(1)(i), permitting service out of the jurisdiction where a person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario, is that laid down in *Boston Law Book Co. v. Canada Law Book Co. Limited* (1918), 43 O.L.R. 13 (which has not been overruled in this respect by *Canadian Steel Corporation Ltd. v. Standard Lithographic Co. Ltd. et al.*, [1933] O.R. 624, and subsequent cases). It is well established that the criterion of Rule 67, relating to the joinder of parties, is to be applied in determining who are "proper parties" within the meaning of Rule 25(1)(i). *Massey et al. v. Heynes & Co. et al.* (1888), 21 Q.B.D. 330, referred to. But although Rule 67 permits the joining as defendants of persons against whom the plaintiff claims a right to relief either jointly, severally or in the alternative, or claims that the same transaction or series of transactions gives him a cause of action against one or more persons, or where he is in doubt as to the person from whom he is entitled to redress, nevertheless, when the Court applies this criterion to Rule 25(1)(i) it must be remembered that the power should be exercised only in the clearest possible cases.

The plaintiff bought goods from A. Co. in Australia, the contract requiring delivery f.o.b. at a port in Australia. The plaintiff insured the goods against damage in transit to its place of business in Ontario. The goods arrived in a damaged condition, and the plaintiff sued the insurer (within Ontario), alleging that they had been damaged in transit, and it also sued A. Co., alternatively claiming damages for breach of contract on the theory (although there was no express allegation to this effect) that the goods had been damaged before delivery to the carrier.

Held, the plaintiff should not be permitted to issue a concurrent writ for service on A. Co. in Australia. Its claims against the two defendants arose out of distinct contracts, and were based on separate causes of action. The fact that there was a common question of fact, relating to the time at which the goods were damaged, should not be the determining factor. *Paul v. Chandler & Fisher Limited* (1923), 54 O.L.R. 410 at 413, quoted and applied. The plaintiff's claim against A. Co. was not so set out as to appear free from doubt. Another important circumstance was that the contract was made in Australia and was to be performed there, which suggested that the rights of the parties would fall to be determined under Australian law.

AN APPEAL by the defendant W. Angliss and Co. (Aust.) Pty. Ltd. from an order of Conant, Senior Master.

27th April 1951. The appeal was heard by SCHROEDER J. in chambers at Toronto.

W. J. Smith, K.C., for the appellant.

B. Grossberg, K.C., for the plaintiff, respondent.

R. V. Smiley, for the defendant Sun Insurance Office of London England.

27th April 1951. SCHROEDER J.:—This is an appeal from an order of the Senior Master made on the 11th April 1951, whereby he dismissed an application made by the defendant W. Angliss and Co. (Aust.) Pty. Ltd. for an order setting aside the *ex parte* order granted to the plaintiff permitting it to issue a concurrent writ against the said defendant for service out of the jurisdiction, but with liberty to the said defendant to enter a conditional appearance. The plaintiff cross-appeals against the order allowing the entry of a conditional appearance but counsel announced at the opening of this motion that it was abandoning such appeal. I have, therefore, to consider only the motion by way of appeal from the Master's refusal to set aside the *ex parte* order.

Unfortunately the Master did not give any written reasons in support of the order which he rendered but all counsel are agreed that he purported to act under the provisions of Rule 25(1) (i) which provides that: "Service out of Ontario of a writ of summons or notice of writ may be allowed wherever . . . a person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario." Before the plaintiff obtained the *ex parte* order permitting service of the writ out of Ontario on the Angliss company in Australia, service was effected in Ontario on the defendant Sun Insurance Office of London England.

The plaintiff sues the insurance company upon a policy of insurance dated 17th March 1950, whereby, it is alleged, the defendant insurer insured the plaintiff in the sum of \$7,000 in respect of a shipment of shearlings consisting of 50 bales which it had purchased in or about the month of January 1950 from the defendant Angliss company. The plaintiff claims that the policy insured these goods "against perils, losses and mis-

fortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise, or any part thereof". The policy covered the said goods during the voyage from Sydney, Australia to Uxbridge, Ontario. The policy also contains a clause insuring: "Against all risks of physical loss or damage from any external cause excluding insects, worms, grubs, larvae and/or other vermin unless as a result of direct contact with other infested cargo on the vessel. Excluding delay and inherent vice." The plaintiff complains that upon delivery of the merchandise in question the sheepskins were found to in a damaged condition and that more particularly the sheepskins had what is known in the trade as "hairslip" and "infestation" and the damage is said to amount to \$7,485.

The plaintiff puts its claim against the two defendants alternatively. As against the defendant insurance company it claims that, the merchandise having been delivered to it in a damaged condition as described, it is entitled to recover from the defendant insurer the sum of \$7,000 in respect of the damage suffered by it, on the theory that such damage occurred within the terms and the times mentioned in the said policy. Alternatively it claims from the defendant vendor \$7,485 damages for breach of contract by reason of the damaged condition of the skins to the extent that the same were affected by the condition of hairslip and infestation mentioned above.

Now it is clear upon the material filed that the contract required delivery of the sheepskins in question to be made f.o.b. Sydney, Australia. It is not seriously contended that the contract was not made in Australia and no attempt is made to argue that the contract, so far as the Angliss company is concerned, was not to be completely performed within Australia. It is apparent from the affidavits before the Court that the plaintiff did not have the sheepskins inspected at the port of Sydney prior to the loading of the merchandise on board the vessel by which they were conveyed, and any evidence which it proposes to call as to the condition of the skins at the time of loading will be evidence of experts who saw the skins when they reached North America and who would express an opinion as to what their condition must have been when they were placed on board the ship at Sydney, basing such opinions upon the condition of the skins upon arrival in New York.

The *ex parte* order in question was made after consideration of the affidavit of Mr. Isadore Levinter, K.C., in which he stated, *inter alia*: "That I have advised the plaintiff and verily believe that the plaintiff has a right to the relief claimed against the said W. Angliss & Co. (Aust.) Pty. Ltd. The facts and circumstances are as follows:". Then followed several paragraphs setting out facts or circumstances which must necessarily have been related to Mr. Levinter by his clients, so that his affidavit is based principally upon information and belief. It is contended by counsel for the Angliss company that this affidavit did not comply with Rule 293 inasmuch as the deponent did not assert his belief as to the correctness of the facts stated, with the grounds thereof, nor did the affidavit include the source of his information. I only mention this objection in passing but in my respectful opinion the order is objectionable on more substantial grounds.

The guiding and determining principle which must govern the decision of the question presented on this motion is to be found in the judgment of Mr. Justice Middleton in *Boston Law Book Co. v. Canada Law Book Co. Limited* (1918), 43 O.L.R. 13. In that case the order of the Master was set aside by Mr. Justice Middleton on appeal, on the ground that the action was "upon two distinct contracts, made between different parties, and it may be under widely different circumstances, and the claim of the plaintiffs against the original defendants is the opposite of the claim against the added defendants". Middleton J. stated at p. 16:

"Plaintiffs may join as against a common defendant when a common question of law or fact will arise (see Rule 66), but defendants cannot be joined unless the transaction gives the plaintiff 'a cause of action against one or more persons' and affords to him a claim 'jointly, severally, or in the alternative' against them (Rule 67). . . .

"Another consideration is of importance. The right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion. The right is not absolute in any case; and, when it is sought to justify an order under Rule 25(g) and Rule 67, in addition to the general discretion possessed by the Court, there is the express provision

of Rule 67(2) enabling the Court to deal with the case if the joinder is deemed oppressive or unfair.

"The Boston Law Book Company are well within their rights when they seek to enforce their contract with a Toronto company in the Courts of Ontario, but no sound principle can justify the bringing in Ontario of an action by a Boston company against defendants in England and Scotland, upon a contract neither made nor to be performed within this Province.

"The assumption of jurisdiction by our Courts over a contract made abroad, by those who owe us no allegiance, seems to me most improper and objectionable."

This judgment was carried to a Divisional Court and was dismissed on the ground that leave to appeal to the Divisional Court had not been obtained, and there was therefore no right of appeal: 43 O.L.R. 233.

It is contended by Mr. Grossberg in a most able argument that the judgment in the *Boston Law Book Co.* case, *supra*, has been overruled by the following cases: *Canadian Steel Corporation Ltd. v. Standard Lithographic Co. Ltd., et al.*, [1933] O.R. 624, [1933] 3 D.L.R. 394; *Cheboygan Camp Ltd. et al. v. The Dominion Fire Insurance Company et al.*, [1938] O.W.N. 157, [1938] 2 D.L.R. 499, 5 I.L.R. 206, and *McCoy v. Alliance Insurance Company of Philadelphia et al.*, [1950] O.W.N. 140 at 142. It should be noted that in the *Boston Law Book Co.* case Mr. Justice Middleton was dealing with the predecessor of Rule 25 (1) (i). It is well established that the criterion of Rule 67 relating to the joinder of parties and of causes of action is to be applied in determining who are "proper parties" and that has been the test laid down in the English cases going back to the case of *Massey et al. v. Heynes & Co. et al.* (1888), 21 Q.B.D. 330. However, the English equivalent for Rule 67 is not the same as ours, as was pointed out by Mr. Justice Middleton. It must also be borne in mind that in that case the defendants were a firm of brokers, and their alleged principals.

The three Ontario cases which are relied upon as overruling the decision in *Boston Law Book Co. v. Canada Law Book Co., Limited, supra*, are cases which relate purely to the question of joinder of parties and causes of action pursuant to Rule 67 and do not involve the added feature which comes within the compass of Rule 25(1) (i). That, it seems to me, is a very impor-

tant distinguishing factor. One must never lose sight of the fact that the right to issue a writ for service out of the jurisdiction is not an absolute one. The Rule provides that service out of Ontario of a writ of summons "may" be allowed in the circumstances set out in the various clauses of subs. 1 of the Rule, and the power to permit such service is a discretionary one which must be exercised in accordance with a sound judicial discretion.

The general principle, which must always be kept in mind in cases coming within this Rule, was ably stated by Mr. Justice Middleton in *Brenner v. American Metal Co.* (1920), 48 O.L.R. 525 at 526, 57 D.L.R. 734, affirmed with a variation, 50 O.L.R. 25, 64 D.L.R. 149, in these words:

"Where our Court assumes to exercise an extra-territorial jurisdiction, and the foreigner has not in any way attorned to our jurisdiction, and the only excuse or justification for the assertion of jurisdiction over him is the existence within the Province of assets which may be reached by execution (Rule 25(h)), manifestly the situation is one of delicacy and one calling for the exercise of the most careful judicial discretion. It is not seemly that a command should issue from our Sovereign to the subject of another State calling upon him to submit himself to the jurisdiction of our Courts, save in the clearest possible cases."

It is to be observed, of course, that this decision was based upon another clause of Rule 25 but the same considerations apply to cases which are within the ambit of Rule 25(1)(i). On this aspect of the matter, reference may well be made to what was stated by Scott L.J. in *George Monro, Limited v. American Cyanamid and Chemical Corporation*, [1944] K.B. 432 at 437:

"Service out of the jurisdiction at the instance of our courts is necessarily *prima facie* an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of the jurisdiction. As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of Or. XI. This is not the kind of case where service ought to be permitted outside the jurisdiction

unless quite exceptional circumstances are shown, and certainly not on such a seriously defective affidavit as was filed in the present case. It is most important that the realities of the case should be considered."

Part of this passage was quoted in the judgment of McRuer C.J.H.C. in the more recent case of *Empire-Universal Films et al. v. Rank et al.*, [1948] O.R. 235 at 237, [1948] 3 D.L.R. 74, in which he gave leave to appeal to the Court of Appeal from an order of Mr. Justice Genest. In the same case, the Chief Justice of Ontario stated at p. 250:

"To permit of the proper exercise of this judicial discretion, it is therefore necessary that something more shall appear by the affidavit than the mere statement that the deponent or the plaintiff's solicitor considers that it is a proper case for granting leave for service out of the jurisdiction. Under Rule 26 the affidavit is required to show, and not merely to state, that the case is a proper one for granting such leave. The reported decisions indicate a number of matters that are proper to be considered before the order for leave is granted, even when the case is one in which leave may be granted under Rule 25. This does not mean that there is to be something in the nature of a trial and determination of the applicant's rights, but there should be a frank disclosure of the material facts necessary to enable the judge or officer to whom application for leave is made to exercise his discretion judicially in determining whether the case is a proper one for service out of Ontario under the Rules."

In the case lastly mentioned, the Court of Appeal rescinded the *ex parte* order which had been made for service out of the jurisdiction, emphasizing the fact that the making of an order for service of a writ of summons out of Ontario is in every case a matter in the discretion of the judge or officer applied to, and that even if an applicant has a claim that comes within Rule 25, he cannot claim an order *ex debito justitiae* but a judicial discretion is to be exercised.

It is to be noted that in the case at bar the plaintiff does not aver that the skins which were the subject-matter of its contract with the defendant Angliss company were in a damaged condition at the time of delivery to the shipping company, and that is something which it must establish in order to succeed in its action against that defendant. It contents itself with alleging

that the goods reached it in a damaged condition and leaves it open to the defendants to quarrel *inter se* over the question as to the precise time when the damage occurred.

It is quite true that Rule 67 permits a joining as defendants of persons against whom the plaintiff claims any right to relief whether jointly, severally or in the alternative or where he claims that the same transaction or occurrence or series of transactions or occurrences give him a cause of action against one or more persons or where he is in doubt as to the person from whom he is entitled to redress. Nevertheless, when the Court applies the criterion of that Rule to a case in which it is asked to apply the provisions of Rule 25(1) (i) it must be borne in mind that such power should not be exercised except in the clearest possible cases. In my opinion the plaintiff has not put its claim against the defendant Angliss company in such a light as to satisfy the Court that the claim may not be a doubtful one *quoad* the applicant.

In the case of *Canadian Steel Corporation Ltd. v. Standard Lithographic Co. Ltd. et al.*, *supra*, Mr. Justice Middleton delivered a dissenting judgment in which he re-emphasized the principles laid down by him in the *Boston Law Book Co.* case, but as already stated I do not regard the *Canadian Steel Corporation* case as overruling the judgment in the *Boston Law Book Co.* case in its application to the case at bar. Reference may also be made to the judgment of Mr. Justice Orde in the case of *Paul v. Chandler & Fisher Limited*, 54 O.L.R. 410 at 413, [1924] 2 D.L.R. 479, where that learned justice stated:

"Quite apart from that difficulty, the plaintiff, had she joined the hospital and the surgeon in the first instance, would have had great difficulty in suing the non-resident defendants here. The tort of which the present defendants are alleged to have been guilty would be entirely different from that alleged against the hospital and the surgeon. It would be extremely doubtful, in my judgment, whether under such circumstances the present defendants could be regarded as either 'necessary or proper' parties to the action."

The plain fact in the case under consideration is that the plaintiff is suing these two defendants upon two separate and distinct contracts and upon two separate and distinct causes of action. The fact that there is a common question of fact in

the case against both defendants relating to the period of time at which the infestation or the damaged condition of these goods first arose should not be the determining factor. However desirable it may be to avoid a multiplicity of proceedings, the Court must always keep present to its mind the considerations that apply when it is asked to make an order under the provisions of Rule 25(1) (i).

The fact that the contract was made in Australia, and was to be performed there, suggests that the rights of the parties fall to be determined according to Australian law. This is another circumstance which weighs heavily against the propriety of the order which is now attacked.

The learned Master not having given reasons for judgment, it is not easy to appreciate the precise grounds upon which he exercised his discretion, but for the reasons stated I cannot escape the conclusion that this was not a proper case for the making of the order for service of the writ of summons out of the jurisdiction on the applicant, and that order must be set aside. The appeal from the Master will therefore be allowed and there will be an order setting aside the *ex parte* order and the service of the writ of summons on the applicant.

In disposing of the costs of the application made to him the Master made no provision for the costs of the defendant insurance company. I direct that its costs of the application before the Master and of this motion shall be costs to the said defendant in the cause. The defendant Angliss company shall have the costs of the application before the Master as well as the costs of this motion.

Appeal allowed.

Solicitors for the plaintiff: Luxenburg, Levinter, Ciglen, Grossberg & Shapirc, Toronto.

Solicitors for the defendant Sun Insurance Office of London England: Rowntree, Wilson & Smiley, Toronto.

Solicitors for the defendant W. Angliss and Co. (Aust.) Pty. Ltd.: Caudwell, Symmes & Smith, Toronto.

[FERGUSON J.]

Re Bondi Better Bananas Limited and Vallario et al. and Bondi et al.

Companies—Winding-up—By Order of Court—“Just and equitable” Provisions—Desire of Shareholder to Withdraw Funds—“Deadlock” in Management—The Companies Act, R.S.O. 1937, c. 251, s. 193(c).

There is no general rule to be applied in determining whether a company should be wound up under the “just and equitable” provisions of The Companies Act. The Court must decide in each case a question of fact, *viz.*, whether it is just and equitable in all the circumstances that the company be wound up. *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783; *Re Shipway Iron Bell and Wire Manufacturing Co. Ltd.* (1926), 58 O.L.R. 585, applied.

The desire of a shareholder to be paid the money he has invested in a company is not in itself a ground for winding up the company under the “just and equitable” rules. *Re Anglo-Continental Produce Co., Ltd.*, [1939] 1 All E.R. 99 at 103, applied.

Although it is a good ground for ordering the winding-up of a company that its substratum has disappeared (*Re Jury Gold Mine Development Co. Ltd.* (1928), 63 O.L.R. 109; *Re Anglo-Continental Produce Co., Ltd.*, *supra*, applied), yet this fact must be established, and it is not sufficient to show that the company’s profits have been reduced, or even that it has been losing money, where there is a possibility of the return of conditions that formerly enabled it to make substantial profits, and nothing has occurred that has removed either the business or the trade the company was incorporated to carry on. The Court and its winding-up processes are not to be used as the means of evoking a judicial decision as to the probable success or non-success of a commercial speculation. *In re Suburban Hotel Company* (1867), L.R. 2 Ch. 737, applied.

Where a deadlock in the affairs of the company is used as a basis for seeking compulsory winding-up the application should be refused if it appears that the only real incompatibility is the result of one shareholder’s desire to have the company wound up. A lack of confidence in the applicant’s fellow-directors, not based on any lack of probity, but arising solely from this difference of opinion, is not sufficient to warrant the making of an order. *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426; *Re Florentine Co. Ltd.* (1926), 31 O.W.N. 70; *Re Martello and Sons, Limited*, [1945] O.R. 453, and other authorities, considered.

TWO APPLICATIONS, both relating to Bondi Better Bananas Limited.

10th and 15th February and 19th and 20th March 1951. The applications were heard by FERGUSON J. in chambers at Toronto.

J. J. Robinette, K.C., for J. B. Vallario and F. A. Vallario.

Lewis Duncan, K.C., for Frank Bondi and Sarah Bondi.

10th May 1951. FERGUSON J.:—There are two motions involved. The first motion is brought by J. B. and F. A. Vallario, shareholders of Bondi Better Bananas Limited, for the winding-up of that company under the “just and equitable” provisions of The Companies Act, R.S.O. 1937, c. 251. The second motion is brought on behalf of Frank Bondi, a share-

holder of the said company, for an order that the stock-transfer book and share register of the said company be rectified by entering the names of Charles Bondi, W. H. Bicknell and John W. Burridge as shareholders of the said company.

Bondi Better Bananas Limited is a company incorporated under the Ontario Companies Act by letters patent dated the 30th December 1943. It was incorporated as a trading and manufacturing company with an authorized capital divided into 490 non-cumulative redeemable preference shares of the par value of \$100 each and 1,000 common shares without any nominal or par value. By the charter the company was declared to be a private company, the right to transfer shares of the capital stock of the company being restricted in that "no shares shall be transferred without the express sanction or approval of a majority of the directors, to be signified by a resolution passed by the board". The charter further contained the private-company provisions that the number of shareholders was limited to 50 and any invitation to the public to subscribe for any shares in the company was prohibited. I do not mention the other provisions of the charter as they do not seem to be relevant to any point on either of the motions.

In the month of August 1942 Frank S. Bondi was carrying on a jobbing business in the sale of bananas, in the city of Toronto, under the name and style of Bondi Better Bananas. At that time John Baptist Vallario was the Ontario district manager of Standard Fruit and Steamship Company of New Orleans, Louisiana. On 1st September 1942 they entered into a partnership on an equal basis. They seem to have carried on under the partnership arrangement until February 1944, when the company took over the business of the partnership as of the 1st December 1943. Upon the incorporation of the company the business of the partnership was transferred to the company as of the 1st December 1943, as appears by minutes of a meeting of the board held on the 4th February 1944. The company agreed to issue as consideration for the assets transferred to it, 200 fully-paid non-assessable, non-cumulative redeemable preference shares of the company of the par value of \$100 each, and a further 66 fully-paid non-assessable shares, presumably common shares, although the minute of the meeting does not expressly so state. In this agreement Frank Salvador Bondi

and John Baptist Vallario, the parties to this motion, are the vendors, and the limited company, Bondi Better Bananas Limited, is the purchaser. The stock position after the completion of the transfer of the partnership assets to the company and the resignation of the provisional directors and transfer of their shares to Bondi and Vallario and their wives was that Bondi and Vallario owned 100 preference shares each, they owned 34 common shares each, and their wives owned 1 share each. There is no pre-incorporation agreement in writing but it is alleged by Vallario, and I think it is clearly established from Bondi's cross-examination, that there was a distinct understanding that each of these gentlemen should own or control an equal amount of the share capital of the company. The charter of the company provided for four directors, and this provision was never changed. The by-laws passed by the board on the date of the company's charter by the provisional directors provided that three directors should form a quorum for the transaction of business. The by-laws further provided—and this provision is not in the charter—that any director or directors might at any time be removed from office at a special general meeting of shareholders called for the purpose and another or others might be appointed in his or their stead. At a meeting of the board held on the 4th February 1944, after the approval of the by-law for the purchase of the partnership assets, the issue of the shares authorized by the by-law was directed by the board. On the 11th May 1944 the provisional directors resigned and after transfer of 1 share each to their wives, Bondi, Vallario and their wives were all appointed directors. John B. Vallario was appointed secretary, and Bondi was appointed president. On the 15th May 1944 a meeting of the board was held, at which Bondi and Vallario and their wives were present. The minutes record that at that meeting the following resolution was passed:

“Resolved that Mr. F. S. Bondi be paid a salary of \$7,500.00 per annum, said salary to be payable as and from the 1st day of September, 1943, for his services as President and General Manager of the Company.”

When he was appointed general manager does not appear from the minutes. It was further resolved:

“that J. B. Vallario be paid a salary of \$7,500.00 per annum, said salary to be payable as and from the 1st day of September,

1943, for his services as Secretary-Treasurer and Sales Manager of the Company."

As I mentioned previously, prior to the formation of the partnership between Vallario and Bondi Vallario was district manager of an American fruit importing company with headquarters in Louisiana, and Bondi was carrying on a jobbing business in the sale of bananas at Toronto. Vallario's employers closed down their Toronto office some time after the beginning of the war, leaving him on their payroll at a nominal wage. He and Bondi came together; Bondi had the business connections and Vallario knew the importing business. The partnership agreement is dated 8th April 1943. It provided that the capital should consist of \$13,292.20. Bondi furnished all the money, one-half of which he furnished directly to the partnership, the other half being by a sort of fiction lent by Bondi to Vallario, who in turn contributed the amount of the loan as his share of the capital of the partnership, and he gave Bondi a promissory note for the same, which was in due course repaid out of the partnership profits.

In December 1942 the partnership established a source of supply in Mexico, from which they could obtain bananas in car-load lots, as it was impossible at that time for the American fruit companies to import bananas by ship, as was their custom. The competition which the partnership would, in normal times, have experienced was greatly lessened, with the result that for some four years the operation of the partnership, until its assets were taken over by the company and the subsequent operations of the company, were very successful and remunerative.

After the termination of hostilities in 1945 the American companies re-entered the import business and the Canadian market and with ships once more available to them they were able to import bananas into Ontario at a price which made Bondi and Vallario's import business unprofitable, with the result that the company was obliged to revert to the jobbing business.

The grounds upon which Vallario now moves to wind up the company are as follows:

(a) the company has been losing assets very quickly;

(b) Vallario has lost confidence in Bondi and Bondi has lost confidence in Vallario;

(c) the affairs of the company are deadlocked.

Vallario's first affidavit sworn in support of this motion disclosed to me very clearly the course of events following the time the American companies re-entered the Ontario market for bananas. In para. 5 of that affidavit Vallario states: "This meant a great shrinkage in the volume and operations of our business, which in its diminished state could not meet the overhead and expense of the organization which we had built up." In para. 6 he deals with the financial statements of the company for fiscal years ending in 1948 and 1949 and until 30th June 1950, which show on his figures, in 1948 a loss of \$4,310.63, in 1949 a profit of \$6,531.66 and for the period including the first six months of 1950 a loss of \$13,933.20. He explains in para. 7 that he is 63 years of age, with family responsibilities, and that he is dependent on the moneys he has in this company to support him, and expresses his opinion that if the company continues in business his money will be lost.

Vallario's affidavit satisfies me that the real fact is that he desires to have paid to him the money which he has tied up in the company, and that has been from the very beginning his only object in these proceedings, and it is the motive giving rise to all the difficulties and disputes between him and Bondi. It is clear to me that once Vallario made up his mind that the days of profitable business were at an end for Bondi Better Bananas Limited he sought to have Bondi agree to a winding-up and so to a distribution of assets, and when Bondi did not agree to that proposition he organized and relentlessly pursued a course of conduct designed to coerce and force Bondi's hand, and bring about a situation which he thought would demonstrate that he and his partner were irreconcilably opposed in policy and methods, so that the Court would be thus induced to make an order to wind the company up.

The desire of a shareholder to be paid the money which he has tied up in a company is not in itself a ground for winding up under the "just and equitable" provisions of The Companies Act: *Re Anglo-Continental Produce Co., Ltd.*, [1939] 1 All E.R. 99 at 103.

Having failed to convince Bondi that the business should be wound up, Vallario then commenced, and pursued, a campaign to force Bondi's hand. His first step was to call a general

meeting of shareholders on the 17th January 1950, which, in his position as secretary-treasurer, he had no legal right to call. The meeting, according to the notice sent out, was called for the following purposes:

“(a) That the services of Messrs. Frank S. Bondi and J. B. Vallario be terminated and the payment, by the Company, of their salaries forthwith cease.

“(b) To discuss, and if deemed advisable, to sell and dispose of the two motor cars owned by the Company.

“(c) To discuss, and if deemed advisable, to forthwith cease operation of the Company's business.

“(d) To discuss, and if deemed advisable, to sell and dispose of all other assets of the Company, either by public or private sale.

“(e) To discuss, and if deemed advisable, to assign the presently existing Lease held by the Company, of the premises 107 King Street East, Toronto, or to sublet any part of the said premises.

“(f) To discuss, and if deemed advisable, to surrender the Charter of the Company.

“(g) For the transaction of other business as may properly come before the meeting.”

The meeting failed to accomplish anything, although the minutes, which were written by Vallario in his capacity as secretary-treasurer, record a poll of 285 votes for the carrying out of the matters mentioned and 35 against. Such a recorded poll was a mistake in view of the number of shares issued—but a mistake which is unexplained in the material filed.

His next step, according to his own affidavit, was to discharge the bookkeeper and cancel the company's insurance. He had no right to do either of these things. His office was that of secretary-treasurer; he did not have power, apart from the board of directors, to do so. Bondi rehired the bookkeeper and made the necessary replacements of insurance. Vallario then proposed that they should dispose of their motor cars and made a show of bringing his in in an attempt to persuade Bondi to turn these assets into cash, as a step in an informal winding-up of the company. Finding that these worrying and harassing tactics were not having the desired effect, he then decided that the main strategy should be changed and adopted a blockade

of the company's trade routes. For this purpose, without any justification, he notified a number of the company's customers that the company would assume no liability to pay for merchandise unless the vendor had procured a written order signed by both the president and the secretary-treasurer Bondi says that as a result of that communication to the customers the company's business fell off sharply, with a corresponding loss of profits.

No further meetings of the directors or shareholders were held, according to the minutes, until after notice of this motion was served on the respondents on the 4th August 1950. That is the date as of which I should examine the parties' rights, as the winding-up order, if made, relates back to the time of the service of the notice: s. 195 of The Companies Act. Moreover, I think that everything that was done on Vallario's part thereafter was in furtherance of his motion and everything done by Bondi was with a view to defeating it.

The power to wind up on grounds other than insolvency and bankruptcy is to be found in ss. 193 to 213 of the Companies Act. Section 193 reads in part as follows:

"A corporation may be wound up by order of the Supreme Court. . . .

"(c) where in the opinion of the Court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up."

As to the first two grounds put forward by the applicant, the material filed on this motion does not satisfy me that the company will continue to lose money. Upon the evidence there is no reason for saying that the capital of the company represented by the shares is likely to be lost if the business continues. Although it lost money in 1948, it made substantial profits in 1949. The loss for the first part of the year 1950 may well be attributable to the winding-up campaign put on by Vallario. This Court and the winding-up process of the Court cannot be used as the means of evoking a judicial decision as to the probable success or non-success of a commercial speculation: *In re Suburban Hotel Company* (1867), L.R. 2 Ch. 737, where Lord Cairns L.J. said:

" . . . if there be insolvency, or anything which is equivalent to a test of insolvency, if there be the circumstances that the

company has not for a certain time commenced business, or has suspended business, that is a test given to the Court by which to prove that the business cannot be carried on, and in those cases the company may be wound up. It is not necessary now to decide it; but if it were shewn to the Court that the whole *substratum* of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the Court might, either under the Act of Parliament, or on general principles, order that company to be wound up. But what I am prepared to hold is this, that this Court, and the winding-up process of the Court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation."

The reasoning in that case has stood the test of time.

There is a suggestion in ground (b) that the substratum of the company has disappeared, and I presume this is based on the contention that it is no longer possible for the company to import bananas in carload lots. It is, of course, a ground for winding-up if the substratum of the company has gone: *Re Jury Gold Mine Development Co. Ltd.*, 63 O.L.R. 109, [1928] 4 D.L.R. 735, 10 C.B.R. 303, and *Re Anglo-Continental Produce Co., Ltd.*, *supra*. But there is no evidence that the substratum of this company has gone. It is true that after the war for a time it was not possible to compete with the American importing companies, but the time may come again, and soon, when the conditions will return which gave rise to the prosperity this company enjoyed throughout the last war. In the meantime nothing has occurred which has removed either the business or the trade which the company was incorporated to carry on: *Re Anglo-Continental Produce Co., Ltd.*, *supra*.

It is urged with great force that the company ought to be wound up in any event, on the ground that there exists an incompatibility between the views or methods of Vallario and those of Bondi which, because of their shareholdings, results in deadlock. It is said that if Vallario and Bondi were in partnership the Court should, in the circumstances, wind up such a partnership, and that the Court should examine the right of a shareholder to wind up this company as if it were a partnership. This appears to be the law as laid down in the

case of *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426 at 432, where it was said by Lord Cozens-Hardy M.R., in the case of a two-man company having equal shareholdings, "that in a case like this we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which would induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company." Also in *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783 at 793, Lord Shaw of Dunfermline said: "... all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company".

I am referred also to *Re Michael P. Georgas Co. Ltd.; Arnold et al. v. Georgas et al.*, [1948] O.R. 708, [1948] 4 D.L.R. 296, 29 C.B.R. at 94, but in that case there was really no disagreement between the two owners because there had been no meetings of the board, and when the Court of Appeal sent the matter back for the purpose of holding a meeting nothing more was heard of it.

In *Re White Castle Inn*, [1946] O.W.N. 772, where there were two owners, Smily J. applied the *Yenidje Tobacco Company* case, but he made a distinct finding that there were substantial losses and differences had arisen as to the management of the business, and there was in fact a deadlock between the two partners.

But the only real incompatibility in views or methods as between Bondi and Vallario is that which has arisen by reason of their difference in views as to whether the company ought to be wound up. Vallario desires the company to be wound up. He wishes to take out his share of the moneys and trade by himself. Bondi does not want the company to be wound up. Every dispute and difference which has arisen between them, it seems to me on the material filed, stems from their difference in wishes as to the winding-up of the company. There is not, as I see it, any incompatibility in views or methods in regard to the company's business. The incompatibility in views or methods arises out of the Vallario proposal to wind up the company and to distribute the assets. Any differences of

opinion on matters of company policy arise out of Bondi's legitimate endeavour to counter the sustained attack staged by Vallario. Vallario does not come to Court with clean hands. They are soiled in uncleanness of his own making. Therefore, I think it is not open to him to invoke incompatibility of views or methods as a ground for winding-up. He is not, in law, permitted to take advantage of his own wrong: *In re Yenidje Tobacco Company, Limited, supra*, where in the judgment of Lord Cozens-Hardy M.R., at p. 430, it is said: "All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

Vallario's lack of confidence in Bondi is not based on any lack of probity on Bondi's part. It has been caused by himself. No other lack of confidence is sufficient to warrant an application to wind up: *Re Florentine Co. Ltd.* (1926), 31 O.W.N. 70; *Re Martello and Sons, Limited*, [1945] O.R. 453, [1945] 3 D.L.R. 626, 27 C.B.R. 204. Any deadlock which exists is directly or indirectly connected with the winding-up, or stems directly from Bondi's refusal to consent to a winding-up. If there is any claim by the company against either of these directors, it can be established in an action brought by either as a shareholder, to which the company is made a party: *Re James Lumbers Co. Ltd.*, 58 O.L.R. 100, [1926] 1 D.L.R. 173 and *In re Anglo-Greek Steam Company* (1866), L.R. 2 Eq. 1, and if there is a claim by either director for salary, that too can be established in an action.

It is to be noted that there is no general rule to be applied in a winding-up under the "just and equitable" rules. The question for the Court to decide is a question of fact: Is it just and equitable in the circumstances that this company be wound up? *Loch et al. v. John Blackwood, Limited, supra*; *Re Shipway Iron Bell and Wire Manufacturing Co. Ltd.*, 58 O.L.R. 585, [1926] 2 D.L.R. 887.

I find as a fact that in the circumstances of this company it is neither just nor equitable that the company be wound up.

The second motion, as I stated at the outset, is brought on behalf of Frank Bondi for an order pursuant to s. 104 of The Companies Act that the stock-transfer book and share register

of the company, Bondi Better Bananas Limited, be rectified by entering the names of Charles Bondi, W. H. Bicknell and John W. Burridge as the holders of one share each in the company. The evidence discloses that on the day after the motion was launched by Vallario to wind up the company Frank S. Bondi made an agreement with his brother Charles Bondi and his solicitors, William Harold Bicknell and John Wilson Burridge, to assign and transfer to each of them one common share of the capital stock of the company and that he, Frank S. Bondi, endorsed the share certificate held by him for transfer of one share to each of the above-mentioned persons, and on the same day he delivered to Vallario through his solicitors, Messrs. Duncan and Bicknell, in Vallario's capacity of secretary-treasurer of Bondi Better Bananas Limited, the certificate so endorsed.

A meeting of the board was called and held on the 15th August 1950, and at that meeting it was moved by Bondi's wife and seconded by Bondi, that the secretary be instructed to issue shares out of Frank S. Bondi's share certificate so as to give effect to the transfers which Bondi intended to make. Vallario and his wife refused to accede to the motion, with the result that it did not carry, but it appears that Vallario stated that if Bondi would give him a letter guaranteeing that at any election of directors Bondi would vote all his shares in favour of Vallario and his wife, Vallario would vote for the motion. This Bondi refused to do. Vallario raises no personal objection to Messrs. Bondi, Burridge or Bicknell, but he takes the position that as the charter of the company provides "that the right to transfer shares of the capital stock of the Company shall be restricted in that no shares shall be transferred without the express sanction or approval of the majority of the directors, to be signified by a resolution passed by the board", no such transfers can be made until the necessary resolution has been passed and there is nothing which requires him or his wife, as directors, to vote in favour of such a motion. Counsel for Bondi contends that when a shareholder submits a transfer of shares to the board for its approval, the directors must consider such application in a quasi-judicial capacity. They are, for the purpose of considering the application to transfer, trustees of the corporation, and have no right unreasonably to refuse the

application to transfer. In fact they have no right to refuse the transfer on any ground unless it be on grounds personal to the transferee.

Counsel for Bondi contends that if there is a deadlock in the company's affairs that deadlock can be broken by the following route: He proposes to call a meeting of the shareholders of the corporation and, by virtue of the provision of the by-laws which enables the shareholders to remove a director during his term of office, to move at the meeting a resolution removing the Vallarios as directors and if there were, as no doubt there would be, a tie vote on such motion, to use the chairman's casting vote to carry the motion. As Bondi is the president he would be chairman of the shareholders' meeting, and would cast the casting vote in favour of the motion. The Vallarios thus being removed from office, it is proposed that the two new shareholders be appointed in their place and stead, following which Bondi would have control of the board, and would be free to carry out his views and methods of doing business without hindrance on the part of Vallario. In this way the so-called deadlock in the management of the company can be broken. It is contended that so long as there is a way open to break a deadlock the company cannot be wound up on the ground of deadlock. There are many reasons which make it, to my mind, doubtful whether Bondi can secure control of the board by this route. For Bondi to use his casting vote as the means of giving himself control of the company is a greater breach of duty as a director than the unreasonable refusal to consent to a transfer.

But, aside altogether from the validity of the course which is proposed, the motion for rectification is brought for the sole purpose of breaking a deadlock, which in my view did not, in law, exist in the circumstances of the company when the winding-up motion was launched, and as it is therefore brought for the sole purpose of defeating the motion brought by Vallario for an order to wind up the company, and as I have taken the view that Vallario is not entitled to have the company wound up under the "just and equitable" provisions of The Companies Act, I think it would be purely academic for me to attempt to decide, on this motion, a point as important as the right to compel a board of directors of a private company to make

transfer of a share without the approval of a majority of the board.

I am of the view that it is unnecessary for me to decide the points raised by the application to rectify the register, having in mind the view I take of the winding-up motion. The disposition that I make, therefore, is that the first motion, brought by Vallario to wind up the company, is dismissed with costs payable by Vallario to Bondi, and the second motion, brought by Bondi to rectify the register, is dismissed without costs.

Order accordingly.

Solicitors for J. B. Vallario and F. A. Vallario: Ludwig, Fisher & Holness, Toronto.

Solicitors for F. S. Bondi and Sadie Bondi: Duncan & Bicknell, Toronto.

[COURT OF APPEAL.]

Rex v. Thomas.

Evidence—Complaints in Sexual Cases—Evidentiary Value—Complaint as Corroboration where Consent is Sole Issue before Jury.

Since evidence of a complaint made at the first reasonable opportunity is admissible on a trial for rape for the purpose, *inter alia*, of negating consent, it follows that where the act of sexual intercourse is admitted by the accused, and the sole issue is whether or not there was consent, evidence of a complaint may be treated as corroborative of the complainant's evidence in the witness-box that she did not consent. *Rex v. Osborne*, [1905] 1 K.B. 551; *Rex v. Calhoun*, [1949] O.R. 180, applied.

Evidence—Corroboration—Rape and Kindred Offences—Charge to Jury—What Matters May Amount to Corroboration—Consent Sole Issue before Jury—Complaint.

On a trial for rape where the accused admits the act of intercourse and the sole issue before the jury is whether or not the complainant consented, corroboration, within the rule laid down in *Rex v. Baskerville*, [1916] 2 K.B. 658, may be found in any independent evidence tending to show the truth of the complainant's story that she did not consent. The following matters may properly be pointed out to the jury as capable of furnishing corroboration: (1) any marks of violence on the complainant's person; (2) her emotional state on reaching home immediately after the alleged offence; (3) the fact that the accused, when first confronted with the complainant, denied ever having seen her; and (4) a complaint made by the prosecutrix at the first reasonable opportunity (see above). The dishevelled condition of the woman's clothing, since it is consistent with an act of sexual intercourse either with or without consent, cannot be corroborative.

Although it is desirable that a trial judge, in charging the jury, should in terms define what in law amounts to corroboration, his omission to do so may be cured by what he says by way of illustration, if there is nothing in the evidence, apart from illustrations that he correctly gives, that might be wrongly considered by the jury as corroborative.

AN APPEAL from a conviction for rape, before Treleaven J. and a jury.

17th April 1951. The appeal was heard by ROBERTSON C.J.O. and ROACH and GIBSON JJ.A.

Arthur Maloney, for the accused, appellant: The evidence as to the operation performed on Mrs. Tremaine in 1949 should not have been admitted, since it is entirely irrelevant to the charge. The trial judge expressly referred to it in his charge to the jury, and the suggestion he made was that a woman who had had that operation would be unlikely to consent to the sexual act. There was no medical evidence to the effect that this was a probable result of such an operation: *Rex v. Shemko*, 83 C.C.C. 271, [1945] 2 D.L.R. 667.

The evidence of the accused's statements should not have been admitted. The first statement was a denial, and was in conflict with the accused's evidence at the trial. It was not admissible because of the manner in which the accused was cautioned before making it. He was told that he was arrested for vagrancy "and a possible charge of rape". The effect of this is bound to be to induce him to make a statement that will avoid the more serious charge. There was no justification whatever for a charge of vagrancy: *Rex v. Dick*, [1947] O.R. 105, 87 C.C.C. 101 at 113, 2 C.R. 417, [1947] 2 D.L.R. 213.

After the taking of the first statement, the police admittedly questioned the accused for two hours, saying that they doubted his first statement. [*W. B. Common, K.C.*: Counsel at the trial expressly said he had no objection to the admission of the statements.] I am not bound by the position taken by counsel at the trial. [ROBERTSON C.J.O.: Suppose counsel at the trial had expressly consented to the admission of the statement, and it was put in without the hearing of any evidence at all as to its voluntary nature?] That is not this case. In any event, if I can show that inadmissible evidence was put in, surely I am entitled to do so. The second statement should not have been admitted because of the two-hour interrogation: *Rex v. Knight and Thayre* (1905), 20 Cox C.C. 711 at 713, 714.

The trial judge, although he warned the jury correctly as to the danger of convicting on uncorroborated evidence, failed to define corroboration. Courts and lawyers have spent years in arriving at a satisfactory definition of corroboration, and it

cannot be assumed that a jury will know, without any definition, what they should seek. They may well have found corroboration in some part of the evidence that was not capable of being corroborative: *Rex v. Zielinski* (1950), 34 Cr. App. R. 193; *Rex v. Yott*, 85 C.C.C. 19, [1946] 1 D.L.R. 683.

Further, the trial judge referred to certain matters as being capable of furnishing corroboration, but every one of these matters lacks the essential characteristic of being independent evidence: *Rex v. Yott*, *supra*; *Rex v. Salman* (1924), 18 Cr. App. R. 50; *Rex v. Gemmill* (1924), 27 O.W.N. 201, 43 C.C.C. 360. The origin of the rule is that there is danger that a complainant will concoct a story, or give such a version of the facts as will place her conduct in the best light. There is equal danger that she will do something to bolster such a story. The evidence of circumstances here may serve to confirm the complainant's testimony, like evidence of a complaint, but it goes no further, and cannot constitute corroboration in law. It is true that in *Rex v. Zielinski*, *supra*, matters like these were held to be corroborative, but that statement is not in accord with *Rex v. Salman*, *supra*, and the case is distinguishable on its facts.

The trial judge erred in several respects in charging the jury as to the complaint. He left them with the impression that it could be considered corroborative of the story told in the witness-box, which was clearly wrong: *Rex v. Evans* (1924), 18 Cr. App. R. 123; *Rex v. Coulthrad* (1933), 24 Cr. App. R. 44; *Rex v. Ellerton*, 22 Sask. L.R. 106, 49 C.C.C. 94, [1927] 3 W.W.R. 564, [1927] 4 D.L.R. 1126. The trial judge should have expressly told the jury that the complaint could not furnish corroboration, and should have instructed them specifically as to the limited use they were entitled to make of it: *Reg. v. Lillyman*, [1896] 2 Q.B. 167 at 177; *Rex v. Osborne*, [1905] 1 K.B. 551; *Rex v. Hill*, 61 O.L.R. 645, 49 C.C.C. 161 at 163, [1928] 2 D.L.R. 736.

It was open to the jury on the facts of this case to bring in a verdict of either indecent assault or common assault, but they were not given that option: *Rex v. Salman*, *supra*. *Wright v. The King*, [1945] S.C.R. 319, 83 C.C.C. 225, 1 C.R. 43, [1945] 2 D.L.R. 523, is distinguishable.

The sentence, in view of all the circumstances, is too severe, and should be reduced.

W. B. Common, K.C., for the Attorney-General, respondent: The evidence as to the operation was admissible to anticipate a defence of consent, and to show that Mrs. Tremaine would be unlikely to consent to promiscuous intercourse. [GIBSON J.A.: But what evidence is there that that would be the effect of the operation?] Only the evidence of the husband. Even if this evidence should not have been admitted it could not have resulted in a substantial wrong or miscarriage of justice.

Counsel for the accused at the trial expressly consented to the admission in evidence of the statements, and their admissibility cannot now be challenged. Any vice there may have been in the taking of the second statement is cured by the fact that the accused went into the witness-box at the trial and told precisely the same story. The accused gave no evidence on the *voir dire* to show that the second statement was obtained by a "grilling", and there is no suggestion in the evidence of any undue influence or pressure. The warning before the first statement referred expressly to a possible charge of rape.

I concede that the trial judge did not precisely define corroboration. In this kind of case, however, the term is largely self-explanatory, particularly where, as here, the trial judge points out what may be taken as corroborative. No objection was taken at the trial to the charge on this point.

The latest case as to what may furnish corroboration is *Rex v. Zielinski, supra*, and the matters that were there said to be corroborative are very similar to the illustrations given by the trial judge here. *Rex v. Yott, supra*, is not an authority to the contrary; it is quite distinguishable on its facts. If these matters, in a case of this kind, are not corroborative, what possible corroboration can there be?

I do not concede that the trial judge left the impression that the complaint might be considered as corroboration, but even if he did, I submit that he was not wrong, in a case like this where the sole issue is consent: *Rex v. Calhoun*, [1949] O.R. 180, 93 C.C.C. 289, 7 C.R. 306.

There was no room on this evidence for a conviction for any other offence than the one charged. I rely on *Wright v. The King, supra*.

Even if there were errors at the trial, the appeal should be dismissed under s. 1014(2) of The Criminal Code, R.S.C. 1927,

c. 36. The sole issue was consent and the jury, even with a perfect charge, could have come to no other conclusion than the one they did reach.

The sentence was not excessive, and should not be interfered with.

Arthur Maloney, in reply: The appeal cannot be dismissed under s. 1014(2) if inadmissible evidence has been given that may have affected the result: *Northey v. The King*, [1948] S.C.R. 135, 91 C.C.C. 193, 5 C.R. 386, [1948] 3 D.L.R. 145.

The fact that the accused gave evidence cannot cure the vice in the second statement, because it may be that he would not have given evidence at all if that statement had not been admitted. [ROACH J.A.: Then the evidence of the complainant would have been uncontradicted.] In any case, the strategy of the defence might have been different.

The fact that there was other evidence that might be corroborative does not cure the defects in the charge in this respect, since that other evidence was not drawn to their attention: *Hubin v. The King*, [1927] S.C.R. 442, 48 C.C.C. 172, [1927] 4 D.L.R. 760.

Cur. adv. vult.

22nd May 1951. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the accused against his conviction by a jury, before Treleaven J., at the assizes holden in the city of Hamilton, on 15th January last, on the charge that on or about the 25th October 1950 he did rape Alice Tremaine. He was sentenced to a term of four years in the penitentiary, and, leave having been granted to him, he now also appeals against that sentence.

The question as to whether or not the accused at the time in question had sexual intercourse with Alice Tremaine is not in issue: the complainant in her evidence stated that he had; the accused in his evidence admitted it. The sole question, therefore, which the jury had to decide was whether the act was with the consent of the complainant or against her will. The complainant testified that she did not consent; the accused testified that she did consent.

The accused is unmarried and 21 years of age. The complainant is a married woman, 35 years of age. She is the mother

of three children, and was living with her husband and children in the city of Hamilton.

In the evening of Tuesday 24th October the complainant, accompanied by a lady friend, attended the theatre in downtown Hamilton. After the show they went to a cocktail lounge, where they had something to eat and the complainant had two drinks of whisky. It is not suggested that she was at any time the worse for liquor. After leaving the cocktail lounge about 12.45 o'clock, the lady friend boarded a bus to go home and the complainant was waiting on the street corner for a bus that would take her to her home. The accused, driving his father's car, came to the corner and, seeing the complainant, he stopped and beckoned to her and suggested he would drive her home. The complainant at first demurred but shortly accepted the invitation and entered the car. The accused drove her to the front of her home, where he stopped. According to the complainant, she sought to leave the car promptly but the accused suggested there was no hurry and grabbed her by the wrist and started the car in motion. As the car rounded a nearby corner, she screamed, leaned over and blew the horn with her free hand, and then grabbed the steering-wheel. In the scuffle, the car went up over a neighbour's lawn. The accused straightened it out on to the highway and drove at a considerable speed along a course that finally led to a lonesome section on Hamilton Mountain. During that journey, according to the complainant, she protested that she wanted to go home and she started to cry. The accused told her to stop crying and sit still. The car was travelling at such a speed that the complainant was afraid to jump out.

The complainant testified that when the accused finally stopped the car she said that she was going to get out and, suiting her actions to her words, she attempted to open the door. Thereupon, the accused grabbed her and pulled her toward him. According to her, she pulled his hair and bit his face, and he then cursed her and said, "I'll fix you", and, suiting his actions to his words, he grabbed her by the throat and started to choke her. She pleaded with him, and finally he released his grasp upon her throat and made it plain that he intended to have sexual intercourse with her. By that time she was terrified, and in terror she yielded.

When the act was completed the accused drove her home, stopping the car about a block from her house. When he stopped the car, or shortly before he stopped it, he turned out the lights. As she left the car, she attempted to get the number of the licence but succeeded in getting only some of the digits in it.

When the complainant entered her home her husband, although in bed, was still awake. The husband testified that the complainant was sobbing, her hair was disarranged, her dress was askew, there were two small scratches on her chest and her throat was very red from ear to ear. He asked her "What is the trouble?", to which she replied: "I have just got myself in a jam." He then said, "What has happened?" to which she replied: "A young chap picked me up and brought me home, and then he started up in his car quick took me out in the outskirts of the city and I have been raped."

The accused, in his evidence, admitted that the complainant had grabbed the steering-wheel of the car as he was first leaving her home. He admitted that when they arrived at the lonely spot on the mountainside he made it plain that he desired to have sexual intercourse with her. He testified that at first she faintly demurred and he possibly used some foul language toward her, but that she finally agreed and that the act took place with her full consent and co-operation.

On Wednesday 25th October, according to the husband, instead of communicating with the police, he started out on a hunt himself to locate the car, part of the licence number and the description of which his wife had given him. He was unsuccessful.

On Thursday 26th October the husband and wife were in down-town Hamilton together, shortly after the noon hour, and, by a coincidence, the wife saw the accused on the street and pointed him out to her husband. Together they approached the accused. Some conversation took place between the husband and the accused, during which the accused denied ever having seen the complainant. The accused stated, among other things, that Police Constable Larson could account for his whereabouts on the Tuesday night, and the husband and wife and the accused started for the police station. On the way a police cruiser, in which were Police Constable Larson and another officer, drove along and stopped, and the husband entered

into a discussion with them that resulted finally in the three of them getting into the cruiser with the police constable to go to a parking-lot where the accused said his father usually parked his car. In the parking-lot the complainant identified a car as being the one in which she had been driven and raped, and the accused admitted it was the one he was driving on the night in question.

The accused was then taken in custody to the police station. There, after a caution was administered to him, he made a statement in which he stated where he had been and what he had been doing from about 3 o'clock on the afternoon of Tuesday 24th October until he went to bed at his home shortly after midnight. This contained no reference to his meeting with the complainant or being in her company. That statement was reduced to writing and signed by the accused.

After about two hours' further interrogation by the police, which further interrogation, according to the evidence of the police constables, was prompted by the fact that they did not believe what the accused had said in his first statement, the accused made another statement in which he did account for his meeting with the complainant on the street corner, their drive, first to the front of her home and later to the lonely spot where he had sexual intercourse with her with her consent. Both those statements were admitted in evidence at the trial after a *voir dire*.

The complainant and her husband both testified in their evidence in chief, without any objection by counsel for the accused, that in August 1949 the complainant had undergone an operation in which her reproductive organs had been removed—a hysterectomy. The husband stated that though immediately after the operation his wife's condition was critical, she "gradually got back to normal". There was no further evidence, medical or otherwise, relating to that operation, the wife's recovery therefrom, or the resulting effect upon her.

Referring to that evidence, the learned trial judge in his charge to the jury said this:

"You are, gentlemen, entitled to consider for what it is worth her physical condition. Having had a hysterectomy operation in 1949—that is, the removal of the womb—would a woman in that condition be either seeking or easily consenting

to this sort of thing? I do not know; that is something for you to consider."

Counsel for the appellant argued that that evidence was inadmissible and that what the learned trial judge said to the jury concerning it amounted to misdirection.

In my opinion that evidence was admissible. A woman of loose morals, in whom all fear of pregnancy was removed, might more readily consent to illicit sexual intercourse than she would if that fear was present. Whatever restraining influence that fear might have on a woman of that type would be removed. That is a circumstance which the jury would be entitled to consider; and from that viewpoint it could only benefit the defence. Counsel for the appellant argued that that was not the use to which the trial judge instructed the jury they were entitled to put that evidence. He construed what the learned trial judge said as containing the suggestion that, as a result of the operation, the complainant's normal sexual appetite had been either entirely extinguished or at least so diminished as to result in her having no sexual desires, and in that circumstance that the jury should consider whether she was likely to seek or consent to the act of sexual intercourse. There was no medical evidence as to the effect of such an operation generally on the sexual inclinations of a woman, and no evidence, medical or otherwise, as to the effect on the complainant.

I do not quarrel with the argument that what the learned trial judge said is open to the construction placed upon it by counsel for the appellant. It would have been better if the trial judge had not made that observation. However, I do not think that this Court should hold that the needless interjection of that observation resulted in a mistrial.

It was next argued that neither of the statements given to the police by the accused should have been admitted in evidence. That argument fails, because it is quite clear from the evidence that counsel for the accused at the trial consented to their being admitted, that is to say, he not merely omitted to object to their admission, but during the *voir dire* he gave his positive consent to their being admitted. Without that consent the course of the trial might have been different.

It was then argued that there was both non-direction and misdirection by the trial judge, first with respect to corrobora-

tion, and second with respect to the effect of the complaint made by the prosecutrix to her husband. On the question of corroboration, the judge instructed the jury as follows:

“There are two other principles of law applicable to a case of this kind which I must mention to you. One is that it is dangerous to convict in a case of this kind on the uncorroborated evidence of the complainant. Now, when I say it is dangerous, that is what I mean. If you are satisfied of the truth of the story of the complainant, and do not believe the story of the accused, you may, notwithstanding corroboration or lack of it, make your finding accordingly; but for a long time it has been considered dangerous to convict on uncorroborated evidence. Of course, I am not saying that in this case there is not corroboration, and I will mention what is brought forward here as corroboration in a moment when I come to deal with the evidence. There is corroboration as to the identity of the accused, because he admits the carnal knowledge; there is no difficulty there; but on the question of corroboration as to whether there was consent or not, there is evidence—it is for you to say what weight you give to it, and if you believe it—the redness of the neck, the scratches on the chest, the dishevelled condition of the clothes, the sobbing of the wife when she got home, the mark or marks on her wrist—depending, of course, gentlemen, on what you believe about it, but there is evidence which if you believe it to be true I would think you might accept as corroboration of her story.”

It was argued on behalf of the appellant, first, that the trial judge erred in not instructing the jury as to what is meant in law by corroboration, second, that the several matters which he told the jury could be considered as corroboration could not in law be so considered.

It would have been better if the learned trial judge had instructed the jury in terms as to what is meant in law by corroboration. Ever since *Rex v. Baskerville*, [1916] 2 K.B. 658, 12 Cr. App. R. 81, what the Court there said, at p. 667, by way of defining corroboration in law has been repeated in subsequent decisions times without number:

“ . . . corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates

him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

Here, since consent or no consent was the only issue, independent evidence which would tend to show that the story of the prosecutrix that she did not consent was true would be corroborative evidence within the definition laid down in *Rex v. Baskerville*. The omission by the learned trial judge to define corroboration in terms, in my opinion, was overcome in the circumstances of this case by what he did say about it by way of illustration. As will later appear in these reasons, he could have added to the illustrations the complaint made by the prosecutrix. He could also have included in them the fact that the accused when first accosted denied that he even knew the woman. If the learned trial judge had included those two pieces of evidence, he would have exhausted all the evidence in his illustrations. Counsel for the appellant, however, argued that because the trial judge had omitted to define corroboration in terms the jury might, if looking for corroboration, have relied upon evidence which could not in law amount to corroboration. The only evidence to which he pointed in support of that submission was the complaint, which he contended, unsuccessfully, could not amount to corroboration. I am entirely satisfied that there was none other to which counsel could have pointed in support of that submission.

The several matters to which the learned trial judge referred, with the single exception of the dishevelled condition of the complainant's clothing, could be corroborative of her story that she did not consent. Any physical evidence of violence against the complainant, inconsistent with consent, would be corroborative of that story. That evidence would include the redness of the neck and the scratches on her chest.

The dishevelled condition of the complainant's clothing would not be corroborative evidence of her story. That condition would be just as consistent with consent as with the absence of it.

It was argued that the emotional condition of the wife could not be corroborative of her story. I disagree. It is of course possible to think of a case where a woman consented to the act and immediately thereafter became affected by remorse,

but it surely must be left to the jury to assess the value to be attached to the emotional condition of a woman shortly after an occasion upon which she alleges that she has been violated. It is evidence to be considered in relation to other evidence which tends to corroborate her story.

It was next argued that the learned judge erred in his charge to the jury with respect to the complaint made by the prosecutrix to her husband, in that (a) he left the jury with the impression that it was corroboration; (b) in any event, he did not tell the jury that it was not corroboration; (c) he failed to instruct the jury as to the limited use to which the complaint might be put.

In his charge to the jury on the question of the complaint, the learned trial judge said this and no more:

“One other thing: It is the duty of a woman who has been sexually attacked, by rape or attempted rape, to complain of the offence at the first reasonable opportunity. Unless it is the first reasonable opportunity, probably the evidence would not be admitted at all as a matter of law, but here, if you accept the evidence, the complainant as soon as she got home told her husband that she had been raped, and he saw the marks on her neck and chest and I think at that time her wrist. But there is the evidence which is before you for consideration as to whether she complained at the first reasonable opportunity or not. The weight to be attached to it, gentlemen, is for you.”

In my view the Crown might have complained about what the trial judge there said, but in my opinion there is no room for complaint by the accused. The Crown could have complained that the complaint by the wife negatived her consent and in that sense was corroborative of her story that she did not consent.

In *Rex v. Osborne*, [1905] 1 K.B. 551, Ridley J., after first dealing with the prerequisites to a complaint being admitted, said: “Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant’s credibility, and, *when consent is in issue, of the absence of consent.*” (The italics are mine.)

This Court, in *Rex v. Calhoun*, [1949] O.R. 180, 93 C.C.C. 289, 7 C.R. 306, held that it was not misdirection to charge a jury in a rape case that a complaint by the prosecutrix after the alleged act may be taken as evidence negating the consent or corroborative of the absence of consent, and cited *Rex v. Osborne*. Therefore, the argument based on what the learned trial judge said to the jury with respect to the complaint fails.

In my opinion, this is a proper case in which to apply s. 1014(2) of The Criminal Code, R.S.C. 1927, c. 36, and to hold that, notwithstanding the defects in the trial to which I have referred, there was no substantial wrong or miscarriage of justice. The appeal against conviction should therefore be dismissed.

In support of the appeal against sentence counsel referred to the age of the accused and to the fact that for several years he has suffered from diabetes, for which he has from time to time been hospitalized, and that since his conviction he has been under medical care.

The accused apparently comes from a good home, but one cannot escape the conclusion, after reading his own evidence, that his sense of decency and morality is shockingly low. Fornication is not a new experience for him and he apparently expects all females to react to his advances favourably to him. Society must be protected from such as he, and such as he must be taught that crimes of this type will be severely punished. Having regard to all the circumstances, I do not think the sentence imposed is unduly severe. I would therefore also dismiss the appeal against the sentence.

Any time spent in custody under the sentence by the appellant pending the appeal may be allowed as time served.

Appeal dismissed.

Solicitors for the appellant: Edmonds & Maloney, Toronto.

[GALE J.]

Re Toronto Newspaper Guild, Local 87, American Newspaper Guild (C.I.O.) and Globe Printing Company.

Labour Law—Powers and Duties of Ontario Labour Relations Board—Conduct of “hearing”—Opportunity to Cross-examine—Review on Certiorari—The Labour Relations Act, 1948 (Ont.), c. 51, ss. 3, 4, 5—Regs. 9, 13.

Certiorari—When Remedy Available—Effect of “no-certiorari” Provision in Statute—Denial of Natural Justice—Refusal to Permit Cross-examination—The Labour Relations Act, 1948 (Ont.), c. 51, s. 5.

Where the Ontario Labour Relations Board, on a hearing to determine whether or not a union is entitled to be certified as a bargaining agent, refuses to permit cross-examination of a union official who makes a statement as to membership (counsel for the employer indicating that there is reason to believe that some persons shown as members in good standing of the union have resigned before the hearing), this amounts to a denial of natural justice, in that it deprives the employer of an opportunity to meet the *prima facie* case made out by the union, and results in a loss of jurisdiction by the Board. A certificate subsequently issued by the Board after such a hearing may be quashed on certiorari, notwithstanding the terms of s. 5 of The Labour Relations Act, 1948.

AN APPLICATION by Globe Printing Company for the removal and quashing of a certificate of the Ontario Labour Relations Board.

19th to 21st September 1950. The application was heard by GALE J. in chambers at Toronto.

J. L. McLennan, K.C., for the applicant.

E. H. Silk, K.C., for the Ontario Labour Relations Board, respondent.

J. H. Osler, for the Union, respondent.

1st June 1951. GALE J.:—I was not able to attend to this matter until recently and it was only then that I came to appreciate how comprehensive it is. Indeed I feel that I have not yet exhausted the field of authority relevant to the points in issue but have decided that it is in the interests of all parties that a decision be given now.

The application is in the nature of certiorari for an order removing into this Court a certificate made on the 20th July 1950 by the Ontario Labour Relations Board under the provisions of The Labour Relations Act, 1948 (Ont.), c. 51, so that the same may be quashed.

The background of the matter may be described in this way. On or about the 12th June 1950 the Globe Printing Company, to which I shall hereafter refer as “the Company”, was served

with a "notice of filing of application" by which the Company was informed that the applicant therein, which I shall call "the Union", sought to be certified as the bargaining agent of the employees of the Company in the circulation department, other than the manager, etc. Attached to that notice was a copy of the application for certification and its accompanying affidavit of verification. In the former the Union took the position that the approximate number of employees in the unit was 80, and that it had "a majority of the employees in the Circulation Department as members in good standing". In its reply the Company stated that the number of employees involved was 93 and it asked the Board to determine whether the Union represented a majority of its employees in the unit as members in good standing within the meaning of the Regulations made under the Act. The Company also requested the Board to direct and conduct a vote by secret ballot of the employees in order conclusively to determine whether they desired to be represented by the Union in their dealings with the Company.

It was given in evidence before me and undenied that in the period which intervened between the filing of the Company's reply and the hearing before the Board on the 12th July 1950 there were widespread rumours throughout the department that a number of the employees involved had resigned as members of the Union.

When the application came before the Board on 12th July 1950 the differences existing between the parties relating to the description and composition of the bargaining unit was discussed and a decision on that matter was reserved by the Board. The claim of the applicant Union as to the number of employees allegedly represented by it as members in good standing was then mentioned and counsel for the Union was asked by the Board to proceed with that branch of the matter. He declared that the Union had, as members, 59 of the employees concerned and he filed with the clerk "a bundle of documents which he said represented fifty-six (56) members who had paid initiation fees or dues and one other document stated to represent a member who had mailed a card to the secretary without enclosing any money for initiation fees or membership dues but who subsequently on request to the secretary of the Applicant Union mailed \$1.00 to the secretary". These quotations are from

passages in the affidavits filed on behalf of the Company on the application before me which have not been controverted by either respondent.

It was also given in evidence that counsel for the Union then remarked that the recording sheets of the Union for the month of June showed 58 members and Mr. Barnes, the Union representative, who had signed the application, and had sworn the confirmatory affidavit, made a statement to the Board substantiating counsel's assertion as to the document with which there had not been enclosed any money. The Board thereupon called upon the representative of the Company to produce and file lists of employees in the circulation department showing occupational classification of individual employees. This request supplemented a similar one contained in a letter from the Board to the Company mailed prior to the hearing, and counsel then filed the lists of employees in that department as of the 7th June 1950 and of the 5th July 1950.

That which next happened is set forth in paras. 10 and 11 of the affidavit of Mr. Hicks, counsel for the Company, and those paragraphs read as follows:

"10. I thereupon submitted to the Chairman of the Board that the documents filed by Counsel for the Applicant Union did not show that the Applicant represented a majority of members of the Applicant Union in good standing as alleged and stated that I wished to cross-examine the representative of the Applicant Union who had given evidence. The Chairman asked me the purpose of this submission and of the proposed cross-examination. I advised the Chairman that I had information to the effect that a number of employees in the department in question had sent in their resignation as members of the Applicant Union. The Chairman stated he saw no relevancy to resignations. Argument then ensued addressed to the Board by Counsel for the Applicant Union and myself in which I pointed out that to refuse me the right to cross-examine was directly at variance with the Board's policy of checking the alleged membership of a union with employers' lists as of the date of the application and of the date of the hearing; and that since I was precluded by previous rulings of the Board from examining the membership cards or other evidence filed by the Applicant Union, the right to cross-examination was vital in order to bring

out the relevant and material facts. Counsel for the Applicant Union submitted that the matter of resignations was irrelevant, that I was on a 'fishing expedition' and, after some further exchange, stated that while he objected to any cross-examination of the Union officials all of the cards did represent members in good standing according to 'the constitution of the Applicant Union'. He refused to deny receipt of resignations from membership in the Union received from employees in the said Circulation Department. The Chairman of the Board ruled against my right to cross-examine.

"11. I thereupon submitted to the Board that since the Company was precluded by the Board's own regulation from soliciting evidence from employees to avoid being charged with interference with their rights under the regulations and since the Board had ruled against the right to cross-examine a heavy onus lay upon the Board to make a full and fair investigation in order to satisfy itself that a majority of the employees of the unit were members in good standing of the Applicant Union and I submitted that the Board should question the witness called on behalf of the Applicant Union and examine the documents filed for that purpose. Counsel for the Applicant Union objected thereto and the Board sustained the objection. I thereupon submitted to the Board that it ought to make a full and fair investigation, including the examination of some or all of the employees of the Company in the department concerned so that it might be satisfied that a majority of the employees were members of the Applicant Union and that they were members in good standing. Counsel for the Applicant Union objected to any such investigation on the ground of delay and I thereupon submitted to the Board that the issue could be resolved by a vote by secret ballot, as requested in the Reply. The hearing was concluded and the Board reserved its decision."

The above account is confirmed by the affidavit of Earl Blake Richards, an executive officer of the Company, who was also present at the hearing before the Board.

By letter dated the 21st July 1950, from the Registrar of the Board, the Company was informed that "the record in this matter has now been endorsed as follows:

"The Board finds that all employees of the respondent in its Circulation Department, save and except Circulation Direc-

tor and his two confidential secretaries, Country Circulation Manager, City Circulation Supervisor, Office Manager and Branch Managers at St. Catharines, London and Hamilton, constitute a unit of employees of the respondent appropriate for collective bargaining.

“The Board further finds, on the basis of the documentary evidence submitted by the parties, that of the 92 employees in that bargaining unit as of the date of filing of the application, 58 are members in good standing of the applicant; that of the 95 employees in that bargaining unit as of the date of the hearing conducted by the Board in the matter, 57 are members in good standing of the applicant.

“A certificate will issue.

“P. M. Draper
for the Board

July 20, 1950.’ ”

The copy of the certificate which was enclosed was in the following form:

“This application coming on for hearing before the Board on Wednesday, the 12th day of July, 1950, Mr. J. M. Barnes, Mr. J. H. Osler and Mr. S. Ripley appearing for Toronto Newspaper Guild, Local 87, American Newspaper Guild, (CIO), and Mr. R. V. Hicks appearing for Globe Printing Company, and the Board having satisfied itself that Toronto Newspaper Guild, Local 87, American Newspaper Guild, (CIO), is a trade union within the meaning of the Regulations made under The Labour Relations Act, 1948; that all employees in its Circulation Department, save and except Circulation Director and his two confidential secretaries, Country Circulation Manager, City Circulation Supervisor, Office Manager and Branch Managers at St. Catharines, London and Hamilton, constitute a unit of employees of Globe Printing Company, appropriate for collective bargaining; and that a majority of the employees in such unit are members in good standing of Toronto Newspaper Guild, Local 87, American Newspaper Guild, (CIO),

“THIS BOARD DOTH CERTIFY THAT Toronto Newspaper Guild, Local 87, American Newspaper Guild, (CIO), is the certified bargaining agent of all employees of Globe Printing Company in its Circulation Department, save and except Circulation Director and his two confidential secretaries, Country Circula-

tion Manager, City Circulation Supervisor, Office Manager and Branch Managers at St. Catharines, London and Hamilton.

"DATED at Toronto this 20th day of July, 1950.

"ONTARIO LABOUR RELATIONS BOARD

"P.M. Draper

"Chairman."

(Seal)

After the certificate was issued counsel for the Company received several telephone calls from various persons representing themselves to be employees in the circulation department, with the advice that although they had been members of the Union they had resigned and had addressed letters of resignation to the secretary of the Union prior to the hearing of the Board on 12th July. In response to their statement that they did not wish to be considered members of the Union, and request for information as to what they could do to protect their interests, they were informed by counsel for the Company that he was unable to advise them in the matter and he referred them to the Board. On the 26th July counsel for the Company despatched letters to the Board and to the Union asking that the matter be reconsidered under the provisions of s. 5 of the Act on the ground that the Board had erred in neglecting to ascertain from the Union, upon the hearing of the application, whether certain of the employees, represented by the Union as being members in good standing, had not in fact revoked their membership by due notice in writing to the secretary of the Union some time before the date of the hearing. In that letter the Company also renewed its request that the matter be resolved by a vote by secret ballot. Counsel for the Union by letter mildly objected to the suggestions contained in the last-mentioned letter written on behalf of the Company. In a letter dated 31st July counsel for the Company submitted to the Board additional information to the effect that the employees who stated that they had resigned were voluntarily offering to appear before the Board should further investigation ensue and that names of such persons would be furnished to the Board if desired. By letter dated 1st August, written by the Board over the signature of the Chairman, the Company was advised that: "The Board does not consider it advisable to reconsider its decision in the case." Counsel for the Company then wrote to the Board on 8th

August saying, *inter alia*, that seven named employees had informed him that they had sent resignations from membership in the Union by prepaid registered post to its secretary a considerable time prior to the date of the hearing; that approximately 20 employees in all had taken similar action; that none of them wished to be represented by the Union or to be considered a member thereof and that in the light of such information it was manifest that more than one-half of the eligible employees in the unit were not supporting the Union. Request was again made for rehearing of the entire matter and for a complete and impartial inquiry into it.

By the 10th August 1950 an employee in the circulation department had spontaneously supplied counsel for the Company with 19 certificates of Post Office registration which were said to be receipts for registered letters of resignation mailed by employees in that department to the secretary of the Union prior to the 10th July. These facts were set out in an affidavit which was forwarded to the Board on the 10th August. On the same day the Chairman, on behalf of the Board, wrote to the Company advising that "The Board does not intend to take any further action in the matter" and by letter dated 11th August the Registrar informed counsel for the Company that the last-mentioned affidavit had been received and that: "You will by this time have received the Board's ruling in this matter, as of August 10th last."

These proceedings to quash the certificate were then launched by the Company.

It should be mentioned at this point that upon the argument before me both respondents conceded that the Ontario Labour Relations Board, being entrusted with judicial functions, is the type of tribunal which is amenable to certiorari.

While many grounds were cited by counsel for the Company, the real scope of his attack can be said to be, first, that no hearing was had as required by the Act and the Regulations; secondly, that the Company was refused (a) the right to put its case before the Board; (b) the right to cross-examine with respect to the evidence submitted by the Union, and, (c) the right of having an investigation made by the Board, and lastly, that the circumstances exhibited bias on the part of the Board in favour of the Union. It is contended, of course, that if any

of those allegations are true the certificate ought to be set aside for the reason that the Company and the employees involved did not have justice, or complete justice, at the hands of the Board.

In the outstanding judgment of Mr. Justice Gibson in *Rex (Martin) v. Mahony*, [1910] 2 I.R. 695 at 731 — a judgment which has received the approbation of the Privy Council in *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128 at 152, 37 C.C.C. 129, 65 D.L.R. 1, [1922] 2 W.W.R. 30 — there is included an admirable statement as to when certiorari will lie. That learned judge says it is applicable —

(a) where there is want or excess of jurisdiction when the inquiry begins or during its progress;

(b) when, in the exercise of jurisdiction, there is error on the face of the adjudication;

(c) where there has been abuse of jurisdiction (as by misstating the complaint, etc., or disregard of the essentials of justice and the conditions regulating the functions and duty of the tribunal);

(d) where the Court is shown to be disqualified by likelihood of bias or by interest;

(e) where there is fraud.

Here the Company takes the position that the remedy it seeks is available under 'c and d above. I propose, in the reasons which follow, to deal with the problems thus presented by discussing and answering the following questions:

(1) Was the Board biased in favour of the Union?

(2) Is the Ontario Labour Relations Board required to conduct a hearing before it may certify a bargaining agent, and, if so, was there a hearing in this case?

(3) Is certiorari available where, in appearing before an inferior tribunal appointed to discharge judicial or quasi-judicial functions, a party is deprived of the opportunity to meet his opponent's case?

(4) If so, was there in the circumstances of this matter such measure of deprivation as to justify an order of certiorari?

(5) Is s. 5 of the Act inapplicable because it does not protect a certificate of the Board, or because, in any event, it does not apply if the Board has denied to one of the parties his right to receive substantial justice?

It was seriously argued that the Board was disqualified in this case because of partiality to the Union, and, of course, if

bias or improper interest exists so as to affect materially the judgment of the tribunal, then it is not capable of effecting a judicial result. It is well established that it is not necessary to prove that actual bias did in fact exist; it is sufficient if there was a likelihood of it or a reasonable apprehension of it. A satisfactory statement of the law in this regard is to be found in *Ex parte Perry*, 51 C.C.C. 105, [1929] 2 D.L.R. 289, where Chief Justice Mathieson stated at p. 109: "Bias as applied to a person or tribunal exercising judicial functions is a state of mind disqualifying the person affected from adjudicating impartially in respect of the subject-matter under consideration. It is not a concrete fact but is an inference to be drawn from relevant facts."

Here, however, the circumstances fall short of indicating that bias had invaded the minds of the men who sat on the Board. Their conduct as exhibited by the proceedings at the hearing and by the rulings of the Chairman were, in my opinion, erroneous in other respects, but were not such as to allow me to draw the conclusion that the Board was improperly favouring the Union.

The next problem to be considered is whether, in the circumstances, there was denial to the Company of its prerogative to receive natural justice from the Board, and, if so, whether that denial gives foundation for a certiorari order. In my view each of those issues is to be resolved in favour of such an order.

That a person who has been deprived of what is vaguely described as "natural justice" is entitled to relief by way of certiorari is established in authorities too numerous to mention. It will suffice if I advert again to subject c in Mr. Justice Gibson's list and cite the judgment of the House of Lords in *General Medical Council v. Spackman*, [1943] A.C. 627, [1943] 2 All E.R. 337, and particularly that of Lord Wright at p. 640, where he says:

" . . . the grounds on which certiorari may be granted are strictly limited. They may, I think for purposes of this case, broadly be taken to be (1) the ground that the council's proceeding was ultra vires, (2) the ground which without any very great precision has been described as a departure from 'natural justice.' "

It is relatively easy to proclaim that certiorari will be granted where there has been an infringement of "the fundamental prin-

ciples of justice" but rather difficult to trace the limits of the application of the rule. In this case was the hearing so deficient as to represent a negation of justice and, secondly, if the hearing was adequate as such, was the Company given fair and sufficient opportunity of either presenting its side of the matter or contesting the case put forward by the Union? Those seem to be the questions which must be examined in deciding whether the general principle is applicable here.

At this stage it might be useful to refer to the relevant provisions of The Labour Relations Act and the Regulations passed thereunder (O. Reg. 279/48). The Union wished to be certified pursuant to the provisions of Reg. 9 and upon its application the Board was entitled to certify it as the bargaining agent of the employees in the unit:

"(a) if the Board is satisfied that the majority of the employees in the unit are members in good standing of the trade union; or

"(b) if, as a result of a vote of the employees in the unit, the Board is satisfied that a majority of them have selected the trade union to be a bargaining agent on their behalf."

In addition, s. 4 of the Act compels the Board to determine whether or not a person is a member in good standing of a trade union. That sections reads in part as follows:

"If in any proceeding before the Board a question arises as to whether . . .

"(h) a person is a member in good standing of a trade union,

"the Board shall decide the question and, subject to such right of appeal as may be provided by the regulations, its decision shall be final and conclusive."

That obligation has been recognized by the Board for it caused to be circulated on or about the 12th August 1949 a directive in the following form:

"The Ontario Labour Relations Board considers it advisable to set forth, for the guidance of those who may be concerned with future applications for certification, its views as to the general nature of the evidence which should support the claim made by an applicant pursuant to regulation 7(1) of the Regulations made under The Labour Relations Act, 1948.

"In support of applications for certification filed on and after September 1, 1949, the Board will require an applicant for

certification to adduce evidence that each employee claimed to be a member in good standing of the applicant has

“(1) applied for membership in the applicant, and

“(2) (a) indicated this assumption of the responsibilities of membership by paying to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant, or

“(b) indicated his assumption of the responsibilities of membership by presenting himself for initiation or by taking the members' obligation, or by doing some other act which, in the opinion of the Board, is consistent only with membership in the applicant, and

“(3) been accepted into membership by the applicant.

“P. M. Draper

for the Board

August 12, 1949.”

The foregoing statement of policy was accorded official recognition in the case of *Re International Chemical Workers Union, A.F. of L., and Sifto Salt Co. Limited et al.* (1949), D.L.S. 7-2109 at 7-2110, where the Board said:

“In making this statement, the Board was, in effect, placing an interpretation upon the term ‘members in good standing’ as contained in the Regulation. Therefore, the substance, rather than the form, of the evidence to be presented was set out. It appeared to the Board that evidence which would go to show compliance with the Board's requirements might take any one of several different forms and the Board accordingly felt that while it was proper to indicate the facts to be established it was not advisable, or indeed, feasible, to specify how those facts were to be established.

“The certification provisions of the Regulations, as we understand them, intend that membership in good standing in a trade union is ordinarily to be taken as demonstrating the desire of employees to have that trade union act on their behalf in collective bargaining with their employer and thus as establishing the right of that trade union to certification.”

Regulation 13 demonstrates that certification is only to be granted after a hearing and in s. 3(7) of the Act there is to be found an indication that the Board has cast upon it the duty

of making full investigation in all matters which come before it. Admittedly, those statutory provisions imposed upon the Board the primary duty of conducting a hearing of some sort for the purpose of determining whether the majority of the employees in this unit were either members in good standing of the applicant Union, or, upon a vote, had selected it as their bargaining agent. The alternative measure of directing a vote was not utilized here because the Board apparently concluded that a preponderant number of the employees concerned were members of the Union at the time of the hearing and admittedly this Court cannot inquire into or review the considerations upon which that decision rested so long as there was a hearing and the substantial requirements of justice were fulfilled.

Was there a hearing in this matter? I think there was, in a narrow sense of the word. It was not the kind of hearing usually encountered in Courts of law, or, in my personal experience, before this Board. No matter how unsatisfactory the proceedings may appear when compared with judicial methods, it is to be remembered, however, that the Board has the right to prescribe its own *modus operandi* and it is not to be censured for having done so unless the essentials of justice have been suppressed in the process. As Lord Parmoor said in *Local Government Board v. Arlidge*, [1915] A.C. 120 at 140: "Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a Court of law there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice."

Counsel for the Company referred to *Rex v. Housing Appeal Tribunal*, [1920] 3 K.B. 334; *Re General Accident Assurance Co. of Canada*, 58 O.L.R. 470, [1926] 2 D.L.R. 390, and *Capital Cab Limited v. Canadian Brotherhood of Railway Employees and other Transport Workers, Division 186*, [1949] 2 W.W.R. 481, [1950] 1 D.L.R. 184, on this branch of the matter, but the emphatic language employed by Mr. Justice Riddell at p. 472 of the report in the second case and by Chief Justice Brown at pp. 500-1 of the third, though merited in those instances, is

not quite appropriate to this case. With considerable doubt I hold that the Board did conduct a hearing and that effect cannot be given to the Company's complaint on that score.

On the other hand, I am not satisfied that the Company was permitted the opportunity either of presenting its side of the matter or of answering the Union's case, and the refusal of such permission constitutes a breach of the fundamental rule that any person in a judicial or quasi-judicial proceeding is to have the right to be heard. That principle has been established many times. In 26 Halsbury, 2nd ed. 1937, at pp. 285, 287, it is said that tribunals such as the Board must observe certain rules, one of which is: "... each party must be given an opportunity of stating his case."

In support of that proposition numerous authorities, including *Fisher v. Keane* (1878), 11 Ch. D. 353, are cited. The head-note in that case states that: "The committee of a club, being a quasi-judicial tribunal, are bound, in proceeding under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and are not to convict him of an offence warranting his expulsion from the club without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending or palliating his conduct".

At p. 360 Jessel M.R. dealt with the point in this way: "It does appear to me that, with such a case as this before them, English gentlemen should at once have said, 'We must hear the whole case before we decide;'"

To the same effect is the decision of the Court in *Labouchere v. Earl of Wharncliffe* (1879), 13 Ch. D. 346.

Perhaps the leading statement on the matter is to be found in Lord Loreburn's judgment in *Board of Education v. Rice et al.*, [1911] A.C. 179 at 182, as follows: "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well

as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith *and fairly listen to both sides*, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, *always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view*. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. 3, of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is *satisfied either that the Board have not acted judicially in the way I have described*, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari." (The italics are mine.)

Reference may also be made here to Lord Atkin's judgment in *Spackman's* case, *supra*, at p. 637, where his Lordship said: "It is not disputed that where there has been a trial, at least before a High Court judge, the notes of the evidence at such trial and the judgment of the judge may afford prima facie evidence in support of the charge, for the council are not obliged to hear evidence on oath, *but the very conception of prima facie evidence involves the opportunity of controverting it*, and I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the prima facie case made from the previous trial. If this is inconvenient it cannot be helped . . . Convenience and justice are often not on speaking terms."

As intimated in the judgment of the House of Lords in the *Rice* case, a *prima facie* case may be contradicted not only by

evidence from other sources but also by means of cross-examination of the person who initially raises the *prima facie* case. In *Rex v. City of Westminster Assessment Committee; Ex parte Grosvenor House (Park Lane), Limited*, [1941] 1 K.B. 53, [1940] 4 All E.R. 132, it was decided that in view of the fact that the committee there involved considered and gave weight to evidence which was not communicated to the parties, the respondents were entitled to have the determination of the Committee quashed. At p. 62 of the report Scott L.J. says: "It was urged, both below and before us, that it was improper for the assessment committee, when acting in a judicial capacity under sub-s. 6, for the purposes of 'hearing and determining' the company's objection, to take into consideration evidence *which it did not give the company an opportunity of inspecting, criticising and answering.*" And at p. 69 du Parc L.J. said: "Those whose claim is being considered have a right to *question and to test* every statement he [an expert] makes, and any opinion he expresses. If that opportunity is denied them, justice is not done."

In *Rex v. Architects' Registration Tribunal; Ex parte Jaggat*, [1945] 2 All E.R. 131, the applicant knew of the existence of two letters considered by the appellant tribunal but was totally ignorant of two other letters relied upon by that body. Lewis J. said at p. 137: "In my view, it is not necessary or material to know whether or not those letters were unfavourable to Mr. Jaggat or not." And at p. 139: "The tribunal had before them, and used, documents which should have been disclosed, or documents which the applicant was entitled to see if they were going to be used by the tribunal. I wish to make it perfectly clear that I am not for one moment suggesting that any of the three members of this tribunal acted in any improper manner in the sense that they did not act *bona fide*. But they did not, in my view, do what the authorities say they should have done, *which was to give a real and effective opportunity to the litigant to deal with, or meet, any relevant allegations made in these documents.*"

In *Rex (Martin) v. Mahony*, [1910] 2 I.R. 695, Lord O'Brien L.C.J., in refusing certiorari, used care to point out that

in that case there had been no want of propriety at the hearing. At p. 708 he makes this very plain: "I wish it to be clearly understood that I am not dealing with a case in which a magistrate so misconducted himself as to refuse to hear evidence or argument. No doubt, in all matters of procedure, the essentials of justice must be observed. It is one of the essential requirements of justice that a charge should be duly formulated: that an accused person should have due notice of it; and that he should be given an adequate opportunity of defending himself. Such matters are not mere formalities; they are the essential requirements of justice."

In Canada the Courts have been equally firm in their determination to preserve the elements of justice. In *Gravel v. L'Union St. Thomas* (1893), 24 O.R. 1, Street J. said at p. 10: "It is one of the fundamental principles of every judicial inquiry, whether conducted in a court or by a body such as this [committee of management of a benefit society], that *a person accused shall not be condemned without a fair chance of hearing the evidence adduced against him* and of being heard in his own defence."

The late Chief Justice Rose of this Court was equally outspoken in *Re Fairfield Modern Dairy Limited and The Milk Control Board of Ontario*, [1942] O.W.N. 579, the following observations being found at p. 581:

"They did appear, and, according to the affidavit, were refused information as to the details of the evidence against them. According to the affidavit, which is uncontradicted, the chairman would not furnish the names or addresses of any persons alleged to have been supplied with milk by the dairy in breach of the regulations; and, also according to that affidavit, on no occasion has the dairy been afforded an opportunity by the Board of hearing the evidence with regard to any charge, or of presenting evidence in repudiation of any charge.

"When the Act says that the Board may suspend a licence after due notice and opportunity of hearing, it means just what it says. A hearing is a real hearing at which the charge is made known, the evidence in support of it is adduced, *the supposed offender is given an opportunity of meeting that evidence by cross-examination*, or by the calling of witnesses, or otherwise, as may be requisite, and it is against all ordinary principles

of the administration of justice to call anything less than that a hearing."

The present Chief Justice of the High Court touched upon the subject in *Re Robinson*, [1948] O.R. 487 at 496-7, 92 C.C.C. 91, [1949] 1 D.L.R. 115, as follows: "But the important matter is that he was given every opportunity to be heard by the Board before its members chose to act on the evidence before them . . . The law in respect to procedure before administrative tribunals is well-established and needs little discussion. They can obtain information in any way they think best, *always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view: Board of Education v. Rice et al.*, [1911] A.C. 179."

Mr. Justice Riddell, in the *General Accident Assurance Co.* case, *supra*, though sitting not on an application for certiorari but on appeal, was most expressive in denouncing a hearing in which the tribunal called and examined witnesses rather than permitting the parties to do so. At p. 472 he said: "I do not say a new trial, for a proceeding in which a judge called and examined all the witnesses himself, and declined to allow the defendant even to cross-examine the witnesses, would be a disgraceful travesty, not to be dignified by the name of 'trial'—it would be a tyrannical and inexcusable denial of natural justice." And further at p. 479: " . . . I must hold that his conduct violated every principle of fair-play, of natural justice."

In the western Provinces of Canada the refusal to grant a reasonable request for an adjournment to a defendant who is charged with an offence under The Criminal Code, R.S.C. 1927, c. 36, has been regarded as so great a violation of the right of every person to a fair trial as to oust the jurisdiction of the magistrate. In *Rex v. Picariello*, 18 Alta. L.R. 338, 37 C.C.C. 284, [1922] 2 W.W.R. 872, 68 D.L.R. 574, the magistrate had declined an adjournment to permit the accused to obtain a witness from British Columbia and in the Court of Appeal of Alberta Hyndman J.A. said at p. 345:

"This in effect means that the defendant was denied the right of full defence due to said refusal by the magistrate to grant such adjournment . . .

"I agree with the judgment of Beck, J. (delivered in Chambers) and of McCarthy, J. on appeal in *Rex v. Dominion Drug*

Stores Ltd., [1919] 1 W.W.R. 218, 30 C.C.C. 318, and 14 Alta. L.R. 384, [1919] 2 W.W.R. 413, 31 C.C.C. 86, that the refusal by a magistrate to the defendant of an adjournment under circumstances entitling the accused to an adjournment prevents the opportunity to make a full answer and defence to the charge and that as a consequence the magistrate loses his jurisdiction."

The decision of Galt J. in Manitoba in *Rex v. Hallchuk (Elchuk)*, [1928] 1 W.W.R. 646, 51 C.C.C. 18, [1928] 1 D.L.R. 731, and that of Britton J. in *Rex v. Lorenzo* (1909), 1 O.W.N. 179, 14 O.W.R. 1038, 16 C.C.C. 19, are both to the same effect. In the last-mentioned case Mr. Justice Britton said: "In my opinion, the defendant did not get a fair trial."

It is my view that the Company did not receive a proper hearing in this instance in that it was not allowed to see the documents filed by the Union or to cross-examine the person who made a statement as to their effect and thus it was denied a reasonable opportunity of meeting the case which was made against it. In one sense it might be said that the Company ought not to be concerned with the consequences of certification and accordingly that any irregularities at the hearing of the application are of no significance. But from the Company's standpoint extremely important results flow from the fact of certification. Indeed, so vital are the changes which may be wrought that usually the employer is as affected as any of the other parties involved. Its relations with its employees and its future wage-structure are two matters which may be materially altered. It is wrong, therefore, to contend that here the Company is any less touched by the certification than the Union or the employees. Its interest in the proceedings, though quite different, is certainly substantial.

It can be stated with accuracy that the only evidence, if it was such, that was before the Board on the hearing of this application, or at any time prior to the issuance of the certificate, consisted of the following:

(a) the statements contained in the written application which was verified by affidavit and which set forth that the applicant Union had a majority of the employees in the unit as members in good standing;

(b) the reply of the Company duly verified by affidavit by which the Company requested the Board to determine whether

a majority of the employees in the unit were members in good standing or to conduct a vote;

(c) the statement by counsel for the Union that the Union claimed 59 members;

(d) a bundle of documents which counsel for the Union filed with the clerk of the Board and which he stated "represented 56 members who had paid initiation fees or dues" and one other document representing "a member who had mailed a card to the secretary without enclosing any money for initiation fees or membership dues but who subsequently . . . mailed \$1.00 to the secretary", and a further statement by Mr. Barnes relating to the last-mentioned document;

(e) a statement by counsel for the Union that the recording sheets for the Union for June 1950 showed 58 members;

(f) the lists of employees in the department furnished by the Company upon the invitation of the Board;

(g) a statement by counsel for the Company that he "had information to the effect that a number of employees in the department in question had sent in their resignation as members of the Applicant Union".

It will be seen, therefore, that the case advanced by the Union, which the Company had to answer to resist certification successfully, was that the Union had as members in good standing 56 to 59 employees in a unit which the Board found to consist of 95 employees. How was the Company to answer the allegations thus made?

It might be thought that the Company could have called as witnesses the persons who were said to have resigned from the Union but it is to be pointed out that because of previous rulings of the Board the Company and its counsel had studiously refrained from indulging in any investigation concerning those resignations and they were not in possession of the names of those persons at the time of the hearing. That the Company's conduct in this regard was prudent is demonstrated by earlier decisions of the Board. I have in mind, for example, the views expressed by it in *Re National Paper Employees' Association and National Paper Goods Limited et al.* (1945), D.L.S. 7-1163 at 7-1164, where this was said:

"We cannot but feel, however, that Mr. Turnbull, who was fully cognizant of his legal position in the matter, as appears

from his letter of September 24, 1943, addressed to a group of employees, was, to say the least, unwise in suggesting that they might obtain assistance from the man who had been acting as legal adviser to the respondent company. Without in any way casting any reflection on learned counsel concerned, it seems to us that such a suggestion may, in a proper case, provide evidence of a scheme on the part of the employer to interfere with the formation of a trade union or employees' organization. Coupled with even fragmentary additional evidence of unfair practices by an employer, we would probably be warranted in finding that the employer has violated section 19(1) of the Regulations."

And more particularly at p. 7-1166: "But even if a statement does not actually amount to a violation of the law, even if the necessary *mens rea* be lacking, it will nevertheless be objectionable if it creates in the mind of a reasonable employee the impression that the employer is bringing pressure to bear upon him to cause him to abstain from exercising his lawful rights."

The Board's opinion in the case of *Re Building Service Employees' International Union, Local 210, and East Windsor Hospital* (1948), D.L.S. 7-1362, particularly at p. 7-1363, is also relevant: "We must, at the same time, express in the strongest possible terms our disapproval of the actions of the supervisory staff of the respondent. Activities of employers or their agents which have, or are intended to have, the effect of disclosing the identity of those employees who are members of a trade union are, in our opinion, highly improper."

It is not without interest that in those cases the Board called attention to the fact that it had allowed cross-examination.

Statements calculated to effect forbearance by employers are also contained in *Re International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) and its Local 426 and Corbin Lock Company of Canada Limited et al.* (1944), D.L.S. 7-1109, where the Board said: " . . . there are circumstances which create in our minds a suspicion that the employer did not preserve that degree of neutrality which is called for by the spirit as well as by the letter of the Regulations."

And in *United Garment Workers of America, Local No. 253, and Deacon Brothers Limited et al.* (1944), D.L.S. 7-1123 at 7-1124: "These prohibitions cover not only the more obvious and open efforts which refractory employers may make to prevent their employees from exercising their rights, but also the more subtle and insidious practices to which such employers may resort."

With those pronouncements before them, the Company and its counsel were left with no alternative but to divert any effort of an employee to discuss his standing or position in the Union. Thus the respondents ignore reality when they argue that the Company might have met the factual allegations of the Union by calling the employees who were thought to have resigned. Even had their names been known, considerable suspicion might have been attendant upon the circumstance that the Company had persuaded them to come forward as its witnesses.

It might next be suggested that the Company could have called as a witness some official of the Union who could give information as to the number of employees in the department who were then members of the Union, but that, of course, was quite unnecessary in view of the fact that Mr. Barnes, who had sworn the affidavit verifying the facts set forth on the application, was present at the hearing and ought to have been made available for the purpose of cross-examination since he also made certain statements of fact on that occasion. The most effective way in which the Company could have tested the merits of the application was to cross-examine the person who was presenting it to the Board. Unfortunately, in this case the right to cross-examination was not granted and in that fact alone I think the Company was improperly excluded from a cardinal privilege which it enjoys under our jurisprudence; that exclusion, of itself, was tantamount to a denial of basic justice.

It was argued by counsel for the Union that the statement by counsel for the Company as to the situation and his request for the right to cross-examine was exploratory and ought to have been turned aside for that reason alone. Subsequent events make it abundantly clear that there was considerable merit in the request for if, at that time, as set forth in the affidavit which accompanied the letter to the Board on the 10th August, 19 of the former members of the Union had resigned, the

majority of the employees in the unit were not members in good standing of the trade union and the Board was quite wrong in certifying the Union as bargaining agent. All it could have done, having regard to the provisions of Regulation 9(2), was to order a vote in the unit to ascertain whether the majority of those included in it were willing to select the Union to be their bargaining agent. I do not wish to be understood as saying that I can review the Board's decision; I am merely pointing out that the Company was not acting frivolously when it asked for permission to cross-examine the person who was submitting the information to the Board.

It was also asserted that the cross-examination of Mr. Barnes would not have produced anything which would have advanced the Company's position. I suppose included in that submission is the thought that the fact that there were resignations was irrelevant and indeed the Chairman himself stated that he saw "no relevancy to resignations". How the Chairman, even though giving the matter little thought, could have made such an announcement, is quite beyond me. Why the other members of the Board remained mute upon hearing it is equally puzzling. Where it is incumbent upon a tribunal to decide at any given moment whether employees are members in good standing of a trade Union, no evidence could be more important than that tending to show that the employees who were believed to be members had in fact resigned. I can only assume that had Mr. Barnes been subjected to any sort of inquiry, he would have disclosed to the Board, if such was the case, as it would appear to be, that some 19 of the Union members had at least attempted to withdraw from the Union. Whether they had done so effectually is, of course, another matter, but with that evidence before it, the Board would have then been required to examine into other circumstances both in law and in fact relating to the question of the validity of the resignations. Accordingly, had the Board authorized cross-examination, the entire complexion of the application would have been changed, temporarily at least.

Lastly, the Company might have been able to defeat the application had it been allowed to see the bundle of membership cards or other documents handed to the Board by counsel for the Union. There is in evidence before me a statement to the

effect that the Board has consistently ruled that employers are not entitled to examine membership cards filed by Unions upon applications for certification. Whatever might be said in favour of the Board's policy in that respect—and I am greatly impressed by the observations of Chief Justice Brown at pp. 498-9 in his judgment in *Capital Cab Limited v. Canadian Brotherhood of Railway Employees and Other Transport Workers, Division 186*, [1949] 2 W.W.R. 481, [1949] 1 D.L.R. 184, if resort is to be had to the ruling, then full and fair opportunity ought always to be conferred upon the parties to the application other than the Union to challenge by cross-examination or otherwise the Union's assertion that it has as members in good standing a majority of the employees affected, for that is the most vital issue to be determined by the Board before it can certify the Union.

I reluctantly conclude, therefore, that in hearing the application in this matter the Board conducted itself in a manner which offends the principles of justice by declining to permit the Company to adduce evidence in the form of cross-examination or by denying to it the right to examine the documents which were filed by the Union. Accordingly, I have no hesitation in saying that the remedy of certiorari is available to the Company to quash the certificate unless s. 5 of the Act* precludes that relief.

Having regard to the concluding words of s. 5 of the Act, which gives the Board the power to "reconsider any decision or order made by it" and to vary or revoke such decision or order, it might be thought that as counsel's affidavit was subsequently placed before the Board on the Company's application to have the Board exert its authority to review the matter, the Company did achieve by its own device a chance of meeting the case put up by the Union. However, one needs only to consult the notification issued by the Board on the 1st August 1950, that "The Board does not consider it advisable to reconsider its

*Section 5 reads as follows:

"Subject to such right of appeal as may be provided by the regulation, the orders, decisions and rulings of the Board shall be final and shall not be questioned or reviewed nor shall any proceedings before the Board be removed, nor shall the Board be restrained, by injunction, prohibition, mandamus, quo warranto, certiorari or otherwise by any court, but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it and may vary or revoke any such decision or order."

decision in the case", its subsequent notification on 10th August that "The Board does not intend to take any further action in the matter" and the Registrar's letter of 11th August that "You will by this time have received the Board's ruling in this matter, as of August 10th last", to see that the further evidence sought to be introduced by the Company was rejected. I say that because of the notice by the Board that it would not "*reconsider* its decision in the case" which can only mean that the Board declined to examine any representations or evidence presented after the date of the certification on 12th July.

Before proceeding to discuss the effect of s. 5, it is only right that I should make known my conclusions with respect to certain contentions put forward on behalf of the respondents. They argued that this Court is confined to an examination of the Board's jurisdiction at the commencement of the hearing of the application and that in determining that matter the Court may look at only (a) the certificate, and, (b) any evidence showing lack of jurisdiction when the hearing began. In the first place, let me say at once that my perusal of the authorities does not lead me to the conclusion that the Court is powerless to act unless it is shown that the inferior tribunal was acting *ultra vires* at the outset of the proceedings before it. That is the most common example of the application of certiorari but it is by no means the only occasion when resort may be had to that procedure. To prove my point I need only call attention to the cases which hold that certiorari is appropriate when there has been an abuse of jurisdiction by the inferior Court, where it has disregarded the essentials of justice during the course of the proceedings before it, or where fraud has been practised upon it. In all of those instances the tribunal may have had jurisdiction not only at the outset but throughout the course of the proceedings, and yet superior Courts have exercised the right of policing such proceedings.

This is made abundantly clear in several cases and perhaps I need only refer to the judgment of Viscount Caldecote in *Rex v. Wandsworth Justices; Ex parte Read*, [1942] 1 K.B. 281 at 283, [1942] 1 All E.R. 56, where, in discussing the basic effect of the judgment of the Privy Council in *Rex v. Nat Bell Liquors, Limited*, [1922] 2 A.C. 128, 37 C.C.C. 129, 65 D.L.R. 1, [1922] 2 W.W.R. 30, upon which great reliance was placed

by the respondents, he says: "That passage does not deal with a case such as the present where there has been a denial of justice to a party who has been convicted . . . the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit."

At this stage perhaps I should add it is my view that the *Nat Bell* case is not particularly applicable to the problems which arise here.

The respondents also seem to draw some satisfaction and support from several passages contained in the judgments rendered in *Local Government Board v. Arlidge*, [1915] A.C. 120, and particularly that which was said by Lord Shaw of Dunfermline at pp. 137-8. As I have already stated, I quite concede that by reason of the working of s. 3(7) of the Act, and because of the nature of the functions performed by this Board, it is quite wrong to think that the Board should adopt methods normally employed by Courts. I would not be so presumptuous as to appraise the manner or form in which the Board receives the evidence upon which it acts, but in the view which I take of this case I do condemn the Board for declining to give to one of the parties before it a chance to test the validity of that evidence in whatever form it was introduced. While the result in the *Arlidge* case would seem to favour refusal of a certiorari order, it is to be remembered that some doubt was raised as to whether the Court was dealing with what might be termed an administrative body and accordingly as to whether certiorari was applicable at all.

Nor do I accept the proposition that this Court is confined to an examination of the Board's certificate and material showing lack of jurisdiction at the commencement of the hearing. That is said to be the effect of the decisions of the Privy Council in the *Nat Bell* case and of Lord Denman in *Reg. v. Bolton* (1841), 1 Q.B. 66, 113 E.R. 1054, but manifestly the limitation was not meant to be applicable to all cases where certiorari was an appropriate remedy.

For example, even in Lord Denman's judgment at p. 72 he says: ". . . it is contended that affidavits are receivable for the purpose of shewing that they acted without jurisdiction; and this is, no doubt, true, *taken literally*:" The words which are italicized are not to be overlooked.

And at p. 60 of the *Nat Bell* case there is to be found this passage: "Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court are unqualified, or were biased, or were interested in the subject matter?"

On the other hand, there are many positive authorities which hold that extrinsic evidence may be given where its object is not to controvert or supplement the proceedings or the return or to impeach the decision upon the facts but to show want of jurisdiction or some other defect causing the proceedings to be amenable to certiorari, and this applies even in cases where that remedy has apparently been taken away by statute. It is enough to make reference to *Rex v. Wandsworth Justices*, *supra*, and *In re McEwen; The Board of Review for Manitoba et al. v. The Trust and Loan Company of Canada*, [1941] S.C.R. 542, [1941] 4 D.L.R. 12, 23 C.B.R. 91, on this point, although the most pertinent pronouncement, so far as it relates to this particular case, is contained in *Rex v. Picariello*, 18 Alta. L.R. 338, 37 C.C.C. 284, [1922] 2 W.W.R. 872, 68 D.L.R. 574, where at p. 346 Mr. Justice Hyndman said:

"As pointed out above, the recent judgment in *Rex v. Nat Bell Liquors Ltd.*, [*supra*] of course prevents the Court on *certiorari* from looking at the evidence to ascertain whether or not there was any evidence upon which the accused could have been properly convicted, but I see nothing in the decision which prohibits its examination for other purposes, such as, to be able to say whether or not the magistrate was acting fairly and justly in refusing an adjournment."

Rex v. Roach, 19 Alta. L.R. 119, 38 C.C.C. 294, [1923] 1 W.W.R. 433, [1923] 1 D.L.R. 334, and *Rex v. Colpe*, 52 B.C.R. 280, [1937] 3 W.W.R. 341, are to the same effect, and in *Rex v. Montemurro*, [1924] 2 W.W.R. 250, Mr Justice Macdonald said:

"Notwithstanding any statute taking away the right to *certiorari* or any law or authority deciding that I cannot look at the evidence to quash a conviction, I hold that I am entitled on a *habeas corpus* application to receive affidavit evidence to show

that the magistrate had no jurisdiction or has exceeded his jurisdiction in convicting the applicant. If the magistrate has exceeded or had no jurisdiction and *certiorari* is taken away so that I may not look at the evidence and the unlawful act does not appear on the face of the record, how otherwise could lack of jurisdiction be made evident than by affidavit? The Supreme Court always had inherent power to enquire into the jurisdiction of an inferior tribunal. The affidavit is received, not to show that the magistrate came to a wrong conclusion, but to show his lack of jurisdiction."

I am satisfied, therefore, that all of the circumstances may be considered to ascertain whether or not the proceedings before the Board were conducted in such a manner that its certificate is now vulnerable.

Some mention should be made at this stage of the argument advanced by counsel for the Union to the effect that as opportunity will only be given to state relevant facts, and as the Board is the only entity which can determine what is relevant, then the Court cannot interfere on the ground that the Board refused to hear counsel for the Company because what the Company was attempting to introduce was something which the Board had decided was irrelevant. That reasoning is fallacious in that it overlooks the precept that every judicial body must fairly hear both sides on any matter which is reasonably pertinent to the issue with which it is dealing and it would be absurd to conclude that the right to be heard can be destroyed by the simple expedient of having the tribunal decree that everything which one side wishes to present is irrelevant. In any event, I am not really concerned with what was or was not proper for the Board to hear. The topic of relevancy was raised merely to show that the request of counsel for the Company to be heard was not a trivial one.

For the foregoing reasons, I am satisfied that if appeal or *certiorari* were available to the Company, the certificate could not stand. As the Regulations do not countenance an appeal, there remains the sole question whether or not proceedings may be had by way of *certiorari* in the face of s. 5 of the Act. This problem is by far the most difficult of those raised upon the argument.

It was urged in the first place that s. 5 does not have the effect of obliterating the right to certiorari with respect to a certification under Reg. 9, and there is much force in this argument. It is to be remembered that the Courts have been on guard constantly to place strict interpretations upon any privative legislation such as this and in this connection I quote *Shin Shim v. The King*, [1938] S.C.R. 378, 70 C.C.C. 321, [1938] 4 D.L.R. 88, and the following language of Crocket J.:

"It is now the settled law of England that nothing short of express language, or language which admits of no other possible construction, can avail to defeat the object of the *Habeas Corpus Act* and also that, once a writ of *Habeas Corpus* has been directed to issue by a competent court and the discharge of a prisoner has been ordered, no appeal lies from such order to any Superior Court."

The section of the Act there being considered was to the effect that no Court could review, quash or otherwise interfere with any proceeding before the Minister concerned or a controller under the Act "upon any ground whatsoever, unless such person is a Canadian citizen, or has acquired a Canadian domicile". The Court held that it could review and reverse a decision of a controller to the effect that the appellant was not a Canadian citizen.

A similar provision was also considered by Mr. Justice Mackay of this Court in *Rex v. Gelber*, [1943] O.W.N. 249, 79 C.C.C. 366 at 368, [1943] 4 D.L.R. 410 at 412, where he stated: "Again, general words in a statute are, if possible, to be so construed as not to alter the common law; Craies on Statute Law, 4th ed., p. 171. *A fortiori* where the general words take away a fundamental right of the subject."

In the much older case of *Reg. v. The Inhabitants of Sandon* (1854), 3 E. & B. 547, 118 E.R. 1247, Crompton J. said at p. 548: "Express words are wanted to take away certiorari."

Perhaps the most exhaustive comment on this branch of the matter is to be found in Mr. Justice Gibson's classic judgment in *Rex (Martin) v. Mahony*, [1910] 2 I.R. 695 at 733, where it is dealt with in this way:

"Judges, disliking or distrusting summary jurisdiction, directed their ingenuity to discover faults in evidence and conviction,

to which they applied methods not merely of demurrer but special demurrer

“Parliament again and again intervened to protect magistrates and suitors from this dangerous, expensive, and dilatory technicality—(a) by declaring convictions, etc. to be ‘final’ or ‘final and conclusive’; (b) by excluding *certiorari*; (c) by prescribing general forms of conviction without evidence . . . so far as regarded no-*certiorari* and finality clauses (which preceded general forms in order of time), judicial decisions made them of small effect, but the general forms not stating evidence proved to be a successful remedy.”

That rule of interpretation, which, to my mind, is a wholesome one, furnishes considerable support to the contention that s. 5 does not affect certification by the Board of bargaining representatives. I say this because “certification” is dealt with in the Act, the Rules and the Regulations in such a way as to indicate that it is to be regarded as something quite distinct from an order, decision or ruling. I need only refer to Reg. 49 to demonstrate this fact. If the section is so worded that it only prevents attack upon the “orders, decisions and rulings of the Board”, then I would think that *certiorari* would not be ousted with respect to a certification. It does seem, however, that the second part of the section is effective for the purpose for which it was apparently intended, for as the certificate is a part of a proceeding before the Board and as no proceedings before it may “be removed . . . by *certiorari* or otherwise by any Court . . .” its language is probably broad enough to work in favour of the certificate in this case.

When I first looked at the authorities which deal with “no-*certiorari*” clauses, I was inclined to the view that, in the circumstances of this case, the Board’s certification would be protected by s. 5. In other words, it seemed upon first consideration that the statutory enactment provided complete protection to the Board even though it had disregarded one of the essentials of justice. That conclusion was bound to come from an initial reading of the decision of the Privy Council in *The Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417. The pith of that judgment is contained in Sir James W. Colville’s judgment at pp. 442 *et seq.* where he says:

"It is, however, scarcely necessary to observe that the effect of this [privative clause] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court but, to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest *defect* of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

That language appears to give recognition to the force of no-certiorari clauses except where it can be shown that the inferior tribunal was manifestly without jurisdiction or has been the victim of fraud. However, upon a closer study of that judgment, and upon looking into the other authorities which have since been decided upon the subject, it becomes apparent that the phrase "want of jurisdiction" is extremely flexible and has been extended to include imperfections which ordinarily might not be regarded as pertaining to jurisdiction at all. I believe that Sir James Colville advisedly and deliberately used the expression "defect of jurisdiction" rather than "want of jurisdiction" or "failure of jurisdiction", and there is support for this theory in a later paragraph in his judgment at pp. 442-3:

"In order to determine the first it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings

or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached."

Apparently his Lordship was there leaving open the possibility that the term "defect of jurisdiction", as he used it, might embrace a situation where, though there has been no lack of jurisdiction in the ordinary sense, the inferior tribunal has refused to adhere to the principles of justice. Legal thought which has since intervened convinces me that such a contingency was entertained by the law lords who sat in the *Willan* case and that accordingly, a prohibitive clause like s. 5 will not expel the right of this Court to review and set aside proceedings in an inferior tribunal where there has been a substantial failure to follow the dictates of essential justice.

My conclusion is fortified by what was said by the Court of Queen's Bench in *Reg. v. The Cheltenham Commissioners* (1841), 1 Q.B. 467, 113 E.R. 1211. There three of the eleven magistrates who quashed certain rates were partners in a company to which belonged certain premises assessed for the rate in the name of the occupier. It was held that the cause having been tried by a Court improperly constituted on account of the interest of the three magistrates, the statutory prohibition as to certiorari did not operate. At p. 478 Patteson J. had this to say:

"The certiorari is not taken away in cases where the decision itself is impeached as being invalid on the ground of malversation. Many attempts have lately been made—indeed there is a perpetual endeavour—to get rid of clauses which take away certiorari, by impugning the jurisdiction. Such attempts we ought carefully to watch; otherwise the clauses would be rendered nugatory. But here, the charge being malversation, the certiorari is not taken away."

Malversation usually connotes bribery or corrupt conduct, but in view of Lord Denman's refusal to acknowledge that there had been fraud in the case, perhaps the word was used in its secondary meaning of "misconduct" or "improper conduct": see Funk & Wagnalls, *New Standard Dictionary*, 1918 ed., p. 1501. It is also not without interest that while the Chief Justice found that the Court was not properly constituted and in that sense perhaps had no jurisdiction, he did state at p. 475: "Nor do I say that there may not be cases in which a magistrate who is in-

terested may sit", giving consent as an instance. But as jurisdiction cannot be founded upon consent, perhaps the judgment is of more weight on this point than is generally realized. It is to be noted that the same result had been reached in *Rex v. The Inhabitants of Rishton*, noted at the end of the *Cheltenham* case.

Turning now to the cases which have been decided since the *Willan* case, it will be seen at once that support has been given to the idea that a denial of justice will amount to such a defect of jurisdiction as to render ineffective a no-certiorari clause. Once again the leading and most illuminating judgment on this topic is that of Mr. Justice Gibson in *Rex (Martin) v. Mahony*, [1910] 2 I.R. 695. At p. 730 he mentions the subject in this way:

"Looking at the history of legislation, I find it hard to suppose that no-certiorari clauses were devised or introduced to validate intrinsically void adjudications, and to confer jurisdiction, which, but for them, would not exist."

At pp. 741-3, his Lordship discusses the matter at considerable length as follows (the italics are mine):

"But though a decision cannot, as regards legal merits, be examined, still under special circumstances the Court can quash. One case is that put by Lord Denman, viz. where the charge is misdescribed A proper charge is of course a condition of jurisdiction Again, the writ lies where the essentials of justice have been disregarded. If a defendant is not summoned and does not appear, the adjudication is invalid. So it is, if defendant, though present, is not allowed to call witnesses: *Reg. v. Russell*, 10 B. & S. 111, 117, *per* Cockburn, C.J.; *Rex v. Morris*, [1910] 2 K.B. 192; *Reg. v. Marsham*, [1892] 1 Q.B. 375, 378; *Lort v. Hutton*, 45 L.J.M.C. 95, *per* Blackburn J., during the argument. . . . It would be a gross violation of the duty of the magistrate to decide for or against litigants without hearing the witnesses. Such a disregard of statutory obligation *and natural justice* would be as unjust and injurious as the misdescribing of a charge, or the hearing of a case *ex parte*. When the whole proceeding is *inverso ordine*, and the fundamental rules of the legal game are disregarded, the regularity in form of the decision cannot oust the jurisdiction of the Court. *Such disregard of duty is a collateral matter affecting the conduct of the tribunal*

just as much as proved bias or interest, or it may be treated as a declining of jurisdiction. Arbitrators are usually supreme Judges of law and fact within the submission; but their refusal or omission to hear parties and witnesses would invalidate the award. It is inconceivable that a Superior Court Judge could try a case, civil or criminal, if contested, without witnesses or any form of proof. . . .

"I do not think that the presence or absence of a no-certiorari clause can affect the question before me. The effect of such clauses was discussed by me in *Reg. v. Cork Justices*, [1898] 2 I.R. 694, and I may refer also to *Reg. v. Sheffield Railway*, 11 A. & E. 194 [113 E.R. 388]; *Reg. v. Wood*, 5 E. & B. 49 [119 E.R. 400]; *Reg. v. Badger*, 6 E. & B. 137 [119 E.R. 816], *which indicate that such clauses apply to irregularities of form or of procedure, not to matters of substance.* . . .

"It [no-certiorari] certainly confers no jurisdiction when the conviction is wrong on its face, or where, by incorporating evidence, it shows the error. I cannot find any case deciding that, if an apparently regular decision on the merits can be quashed as void for error, as being without jurisdiction, such void adjudication can be brought within jurisdiction by such a clause. No-certiorari could not possibly affect the parallel remedies of mandamus or prohibition. *Nor can it protect where jurisdiction is abused.*"

At p. 747 this also was stated: "To convict without evidence at all, in defiance of all general summary jurisdiction statutes, seems a still more serious infraction of judicial conditions. *To proceed to adjudication without hearing is essentially ultra vires, is declining of jurisdiction, and merits grave judicial censure.*"

The Canadian cases have also not been generous in their application of the judgment in the *Willan* case. I refer first of all to the early decision in this Province in *Reg. v. Eli* (1886), 10 O.R. 727. The Court decided in that case that they should grant a writ of certiorari, though presumably the remedy had been taken away by s. 161 of The Canada Temperance Act, since the proceedings had been conducted in a manner contrary to natural justice, the summonses having been served almost immediately before the sittings of the Court in which the defendant was called to attend.

While not as apt, the observations of McTague J. at p. 33 of the report in *Re Nelson*, [1936] O.R. 31, 65 C.C.C. 94, [1936] 1 D.L.R. 28, are helpful on this point. There he said: "Here the record, such as it is, discloses that the accused did not plead; that there was no evidence offered of any description; that there were no depositions; that there was no judicial proceeding in any sense of the word. *To hold that in such circumstances the Magistrate had jurisdiction would offend all the principles of natural justice.* There was no exercise of any powers by a judicial officer in his judicial capacity at all in the proper sense."

The effect of no-certiorari clause was exhaustively discussed by Roach J. recently in *Re Brown and Brock and the Rentals Administrator*, [1945] O.R. 554, [1945] 3 D.L.R. 324. It is true that his decision on this particular branch of his judgment was not considered by the Court of Appeal, and it is also true that at p. 560 his Lordship would seem to indicate that a denial of the right to be heard would not appear to fall precisely into the language used by the Privy Council in the *Willan* case. However, Mr. Justice Roach did conclude his findings on this topic by saying, at p. 562:

"The result of the English decisions to which I have referred is that the giving of notice and *an opportunity to be heard in a judicial proceeding affecting substantive rights*, even where notice is not specifically required by statute, is a condition precedent to any tribunal exercising jurisdiction which it would otherwise have."

The matter has received similar treatment in some of the western Provinces, the most important judgment on this branch of the motion being that of Martin J. in *Re Sing Kee* (1901), 8 B.C.R. 20, 5 C.C.C. 86. There a magistrate went alone to have a view of premises in which it was alleged there had been sales of liquor. Upon an application for a writ of certiorari the *Willan* case was argued and Mr. Justice Martin held that:

"Even though section 108 [of The Indian Act, R.S.C. 1886, c. 43] purports to take away the right to *certiorari*, I think the cases shew that it nevertheless lies where there has been improper conduct of the Magistrate or the fundamental principle entitling the party to a fair trial has been overlooked. I hold that what is complained of here is not within the scope of section 889 of the Criminal Code—it is really an inherent defect in the

course of legal procedure, something not warranted by law—which voids the conviction even though the course taken by the Magistrate was with the best intention.”

Those words are extremely persuasive, particularly when one finds that the judgment is cited with approval by Mackay J. of this Court in *Rex v. Gelber*, [1943] O.W.N. 249, 79 C.C.C. 366 at 368, [1943] 4 D.L.R. 410 at 412. It was argued by the respondents that the *Sing Kee* case is not in point because the fact that the magistrate took a view of the premises was apparent on the face of the proceedings. It do not comprehend the logic of that reasoning. The mere fact that the transgression of the magistrate was apparent on the record would surely not oust jurisdiction which he would otherwise possess.

The cases of *Rex v. Picariello*, *Rex v. Lorenzo* and *Rex v. Montemurro*, *supra*, all of which hold that the refusal by a magistrate to grant a defendant an adjournment under circumstances entitling him to an adjournment prevents the opportunity to make a full answer and defence to a charge and as a consequence the magistrate loses his jurisdiction, are equally pertinent.

The judgment of Chief Justice Brown in *Capital Cab Limited v. Canadian Brotherhood of Railway Employees and Other Transport Workers, Division 186*, [1949] 2 W.W.R. 481, [1949] 1 D.L.R. 184, is entirely applicable, although the neat point is not brought to the fore there as it might have been.

The only other case to which reference should be made is that of *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, [1949] A.C. 134, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055. In Saskatchewan the Labour Relations Act contains a provision even more stringent than s. 5 of the Ontario Act. In that case an order of certiorari was sought on the ground that the legislation was unconstitutional, that the Board had proceeded on a wrong legal principle and that it was biased. The Court of Appeal of Saskatchewan granted the order on the sole ground that the legislation was *ultra vires*. An appeal was taken to the Privy Council and it was there held that as the Board did not have the judicial functions contemplated by The British North America Act the legislation was valid and the matter was remitted for further consideration. In dealing with

the appeal, however, this was said by the Privy Council at p. 151:

"On behalf of the respondent stress was laid on the provisions of s. 15 of the Act. It was urged that a tribunal, whose decisions were not subject to appeal and whose proceedings were not reviewable by any court of law or by any certiorari or other proceeding whatsoever, must be regarded as a 'superior' court or a court analogous thereto. But the same considerations which make it expedient to set up a specialized tribunal may make it inexpedient that that tribunal's decisions should be reviewed by an ordinary court. It does not for that reason become itself a 'superior' court. *Nor must its immunity from certiorari or other proceedings be pressed too far.* It does not fall to their Lordships on the present appeal to determine the scope of that provision, but it seems clear that it would not avail the tribunal if it purported to exercise a jurisdiction wider than that specifically entrusted to it by the Act."

It is noteworthy that when the matter again came to be heard by the Court of Appeal the orders made by the Labour Board were quashed *in toto*. By those orders the Board had reinstated five employees with payment of the entire amount which they would have received by way of wages had they not been discharged. The formal order as well as the reasons for judgment of the Board fixed the monetary loss by simply calculating what wages the employees would have received had they continued in their employ. No other consideration was mentioned. The Court of Appeal nullified the orders on the single ground that the Board had ignored the rule of law requiring the employees in those circumstances to mitigate their loss.

The foregoing authorities, and particularly those portions of the judgment of Mr. Justice Gibson in the *Mahony* case which I have italicized, point to the irresistible conclusion that inferior Courts are not sheltered by no-certiorari provisions where there has been an abuse of jurisdiction in the form of a denial of substantial justice. There are three cases, however, two in England and one in Nova Scotia, which seem to be at variance with the authorities which I have quoted on this subject.

The first is *Ex parte Hopwood et al.* (1850) 15 Q.B. 121, 117 E.R. 404, a frequently discussed case. Under s. 47 of the Act there being considered magistrates were given an option on

proof of service to proceed *ex parte* or to issue a warrant. In that case 50 summonses were served the day before the hearing. Counsel for the accused, but not the accused, appeared and asked for an adjournment, which was refused. A witness was then called in one case, who was examined and cross-examined, and counsel addressed the justices as to that case. The accused was then convicted in all 50 cases and it was held that certiorari would not lie because of the special statutory provision barring that relief.

Lord Campbell said at p. 127: "The certiorari is taken away; so that we cannot interfere unless they have acted altogether without jurisdiction."

At pp. 127-8 Patteson J. said: "Sect. 69 is very express; and, the certiorari being taken away, the question is whether Mr. Pashley has made out that there was no jurisdiction. . . . As to the want of evidence on matter of fact, that cannot possibly take away jurisdiction."

And Wightman J. stated, at p. 128: "Then, as to the want of evidence, if the magistrates had any jurisdiction to proceed, we cannot ask whether they heard evidence at all, or whether the evidence they heard ought to have led them to an opposite conclusion."

These observations might be interpreted as suggesting that the Court was there expressing the opinion that a denial of a fair hearing did not mean that jurisdiction had been exceeded but later cases have shown that the decision is not to be so treated. In his judgment in the *Mahony* case, *supra*, Lord O'Brien L.C.J. alluded to Mr. Justice Wightman's judgment in this way at p. 715:

"The expression in the judgment of Mr. Justice Wightman that the Court could not, if the magistrates had any jurisdiction to proceed, ask whether they had any evidence at all, has been severely animadverted upon; but it must be remembered that the learned Judge was not dealing with 'case stated', but with *certiorari*, and the principles applicable to *certiorari*. He was dealing with the mere want of evidence. Of course if a magistrate refuses to hear witnesses or evidence, he would be guilty of judicial *misconduct*, which could be challenged by *certiorari*."

And in *Reg. (Daly) v. Justices of Cork*, [1898] 2 I.R. 694 at 699, Gibson J. again discussed it: "The case of *Ex parte Hop-*

wood, 15 Q.B. 121, cannot be regarded as inconsistent with *Reg. v. Brickhall*, 10 Jur. (N.S.) 677, or as an authority that the exclusion of *certiorari* disables the Court from inquiring into the existence and nature of the complaint. Where there is no appearance, the service of a summons, as prescribed, is an essential preliminary to jurisdiction: *Reg. v. Farmar*, [1892] 1 Q.B. 637. In *Hopwood's Case*, [*supra*] had the service of any summons been *disproved*, and had there been no appearance, the decision ought to have been against the conviction. The jurisdiction vested in the Justices to inquire into the service of the summons—a condition precedent to jurisdiction to proceed *ex parte*—does not enable them by a wrong finding, to evade *certiorari*: *Reg. v. Smith*, L.R. 10 Q.B. 604.”

Ex parte Blewitt; *Re The Justices of Shropshire* (1866), 14 L.T. 598, to the same effect as *Ex parte Hopwood et al.*, has also provoked unfavourable comment and the outcome of those two cases is certainly incompatible with the result in the *Sing Kee*, *Picariello*, *Lorenzo* and *Montemurro* cases, *supra*.

The Nova Scotia decision which I had in mind is *Treholm v. The King*, 21 M.P.R. 299, 90 C.C.C. 215, [1948] 1 D.L.R. 372, the headnote of which reads [C.C.C.]: “A Military Court is not deprived of jurisdiction over a serviceman, remanded to trial before it by his Commanding Officer, merely because of faults of procedure committed by the Commanding Officer; for example, failure to permit accused to cross-examine witnesses, or failure to exercise a judicial discretion in remanding accused for trial, or failure to consider the admissibility or inadmissibility of evidence. Consequently prohibition does not lie to the Military Court.”

However, it is to be noted that Carroll J. at p. 217 definitely found that “There is nothing in his evidence [the Commanding Officer’s] which in the least substantiates objections (a) and (b)” (the first two objections mentioned in the above headnote). The findings of fact which are contained in the passage I have quoted destroy much of the effectiveness of the judgment upon the law. The other statements contained in the judgment are obiter and even those statements have defined limitations. Moreover, the judgment seems to be out of harmony with that of my brother LeBel in *Re Thompson*, [1946] O.R. 77, 86 C.C.C. 193, 1 C.R. 60, [1946] 4 D.L.R. 579 (*sub nom. Rex v. Thompson*),

As I have already said, while those three judgments appear to militate against the opinion which I have reached in this matter as to the impotency of s. 5, they are not sufficiently decisive to cause me to change my views.

There are two other points which deserve attention. In the first place, and while this is not frequently mentioned, Magna Carta is the law of this Province by virtue of R.S.O. 1897, c. 322, which is "An Act respecting certain rights and liberties of the people": see R.S.O. 1950, vol. 5, Appendix "A". That Act provides that the King shall not "deny or defer to any man, either justice or right" and gives force to the contention that any act of a tribunal which disallows to any person who comes before it his privilege of justice is *ultra vires* of that tribunal and for that reason alone it may well be thought that a denial of justice is equivalent to disclaimer of jurisdiction.

Nor should it be forgotten that here it has been conceded that the Ontario Labour Relations Board is a body to which certiorari applies since it is one which is obliged to discharge judicial functions. Can it not be said, therefore, that if it refuses to act judicially it is doing something which is not sanctioned by the statute which has created it and is thus acting beyond its jurisdiction?

In this connection the following words of Perdue C.J.M. in *Canadian Northern Ry. Co. v. Wilson*, 29 Man. R. 193 at 197, [1918] 3 W.W.R. 720, 43 D.L.R. 412, may be quoted: "I think the true construction to apply to the section is that, where the Board has jurisdiction over any matter brought before it, its action or decision is final and not subject to question or review in any court. It follows that, if the Board attempts to deal with a matter over which it has not acquired jurisdiction *or if it fails to be governed by the provisions of the Act according to their true intent and meaning*, its actions, decisions or proceedings are not protected by the section and a party affected might seek the remedies available to him in the courts notwithstanding the provisions of section 57."

An order will go removing into this Court the certificate of the Board made on the 20th July 1950 and quashing the same. In view of all the circumstances, there will be no order as to costs. The members of the Board did not conduct themselves in such a way as to warrant an order for costs being made

against them and the Union simply accepted that which had been done by the Board.

There are two brief observations which I should like to make before leaving the matter. In the first place I desire to say that I should most profoundly regret it if any words in this judgment were to be construed as a reflection upon the integrity of the men who sit on the Board. What they did in this case was indiscreet and wrong, but I do not wish to be understood as thinking that it was done in bad faith. Secondly, and with some presumption perhaps, may I say that it seems unfortunate that s. 5 was included in the Act, for the reason that it almost imputes doubt as to the Board's capacity to do what is right. Surely those who are entrusted with the powers produced by the Act are deserving of a greater measure of confidence. Moreover, I would think that the members of the Board would be the first to acknowledge that if a person would otherwise be entitled to one of the extraordinary remedies formerly granted by the prerogative writs, he should not be deprived of that redress merely because of the existence of the prohibitive section of the Act.

Certificate quashed.

Solicitors for Globe Printing Company, applicant: MacDonald & Macintosh, Toronto.

Solicitors for the Union, respondent: Jolliffe, Lewis & Osler, Toronto.

[COURT OF APPEAL.]

Tytgat et al. v. Tofflemire.

Schools — Public and Separate School Assessment — Residence within Three Miles — Meaning of “resides” and “site of the schoolhouse” — The Separate Schools Act, R.S.O. 1950, c. 356, s. 57 — The School Sites Act, R.S.O. 1950, c. 348, s. 1(d).

For the purposes of s. 57 of The Separate Schools Act, which provides that no person shall be assessed as a separate school supporter “unless he resides within three miles in a direct line of the site of the schoolhouse”, the word “resides” is not limited to the dwelling-house on a farm, but includes the whole of the farm lands, and the phrase “site of the schoolhouse” similarly includes the whole of the land surrounding the school and owned and used by the school board in connection with it. Consequently, if a farm is within three miles of the boundaries of school lands the owner of the farm is entitled to be assessed as a separate school supporter, even if the farm-house and the schoolhouse are more than three miles apart. *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102; *The City of Victoria v. Trustees of Our Lord’s Church in Victoria* (1915), 22 B.C.R. 174, applied.

Judgments and Orders — Effect — Res judicata — Necessity for Identity of Subject-matter.

For the defence of *res judicata* to succeed it must be shown not only that the cause of action is the same in the two proceedings, but also that there was an opportunity of recovering in the first action that which it is sought to recover in the second. Consequently, a judgment dismissing an appeal from an assessment in one year cannot constitute *res judicata* in an appeal against an assessment in a subsequent year, even if the same parties are involved and the points on which the appeal is based are precisely the same. A new liability has arisen which was not in issue in the first appeal, although it is of the same type. *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458; *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94 at 100, applied.

AN APPEAL by way of stated case under The Assessment Act.

1st March 1951. The appeal was heard by ROACH, AYLES-WORTH and MACKAY JJ.A.

L. G. O’Connor, for the appellants: The main point involved in this appeal has never been decided in this Court or any other Court of equal jurisdiction.

The trial judge was wrong in holding that the matters involved were *res judicata*. There can be no such thing in assessment cases, since each assessment and levy creates a new liability: *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 4 D.L.R. 145.

When a farm is assessed for school rates it is the whole farm that is assessed, and not merely the farm-house. The words “residence” and “dwelling-house” do not appear in s. 56 of The Separate Schools Act, R.S.O. 1937, c. 362 (now s. 57),

but the section refers to where a taxpayer "resides". A farmer, particularly, "resides" on his entire farm: *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102 at 104; *The Shorter Oxford Dictionary*, s.v. "resides". In the ordinary assessing of a farm, the whole farm is assessed: *The Assessment Act*, R.S.O. 1937, c. 272, s. 23; moreover, s. 27 of that Act uses the expression "residing on the farm". I refer also to *Blodgett v. The Trustees of School District No. 3 of The Township of Smith*, [1943] O.W.N. 32, and ask this Court to overrule it.

The "site of the schoolhouse" must include the lands on which the school building is situate, used in conjunction with it: *The School Sites Act*, R.S.O. 1950, c. 348, s. 1(d); *The Separate Schools Act*, s. 34; *The City of Victoria v. Trustees of Our Lord's Church in Victoria* (1915), 22 B.C.R. 174, 9 W.W.R. 173, 32 W.L.R. 330, 25 D.L.R. 617. If an interpretation of a statute or a group of words in a statute leads to an illogical result that interpretation should be avoided. It is certainly illogical to limit the words "site of the schoolhouse" to the actual building, and the land covered by it. The only way that these properties can be considered as more than three miles apart is by measuring from building to building.

J. F. Twigg, K.C., for the respondent: The 1948 decision constituted *res judicata*, since it was between the same parties and was on the same mixed question of law and fact, as to whether or not the appellants were separate school supporters. There must be finality in these cases: 13 Halsbury, 2nd ed. 1934, paras. 464 *et seq.* [ROACH J.A.: Is not a ratepayer entitled to question his assessment every year?] Only if the appeal concerns the amount of the assessment. [AYLESWORTH J.A.: These appellants are resisting their liability to be assessed as public school supporters; have they not the right to resist it on any grounds year after year when it is sought to impose the liability on them? Is it not a recurring liability?] I would agree only as to the amount of the assessment, or the amount of the tax levied. These appellants are estopped from raising the same matters a second time, although another ratepayer might appeal on the same grounds.

The manner of creating a separate school section is explained in *In re Roman Catholic Separate Schools* (1889), 18 O.R. 606.

A circle should be drawn with the schoolhouse as its centre and a radius of three miles.

L. G. O'Connor, was not called on to reply.

Cur adv. vult.

29th May 1951. The judgment of the Court was delivered by

MACKAY J.A.:—This is an appeal by way of a case stated by His Honour A. J. Gordon, Judge of the County Court of the County of Essex, made by him in compliance with an order of the Court of Appeal for Ontario made on the 4th April 1951, pursuant to s. 85(5) of The Assessment Act, R.S.O. 1937, c. 272, now R.S.O. 1950, c. 24, s. 81(5).

The facts as contained in the case stated are as follows:

"The Appellants are Roman Catholics and the registered owners in occupation of 120 acres of land in the Township of Colchester North, in the County of Essex and Province of Ontario, being parts of Lots 20 and 21 in the 10th Concession of the said Township. There is only one dwelling house upon the said farm which is located 900' south of the northerly limit of the farm and 574' north of the southerly limit of the farm. The Appellants occupy this dwelling as a house.

"The nearest separate school to the lands of the Appellants is what is known as the Essex Separate School, situate in the Town of Essex and owned and operated by The Board of Trustees of the Roman Catholic Separate Schools for the Town of Essex. This consists of a brick school building located upon an area of land used as a playground, etc., approximately 5 acres in extent, both of which are owned and occupied by the said School Board.

"It is admitted that the Appellants gave the Clerk of the Township of Colchester North a proper and sufficient Notice pursuant to Section 55 of The Separate Schools Act, R.S.O. 1937, Chapter 362, that they were Roman Catholics and supporters of the separate school above mentioned and asked that their taxes for the year 1950 be applied to the support of the said separate school. When the Assessment Notice for the 1950 assessment was subsequently delivered, the Appellants were assessed as Public School Supporters. From this assessment, they duly appealed to the Court of Revision for the Township of Colchester North which Court dismissed their appeal and from that dismissal, they duly appealed to the County Court Judge of the

County of Essex. I heard the said appeal and at the opening of the appeal counsel for the Appellants pursuant to Subsection 2 of Section 85 of the Assessment Act, R.S.O. 1937, Chapter 272 requested me to note any question of law or construction of statutes and state the same in the form of a special case for the Court of Appeal.

"The uncontradicted evidence of W. J. Fletcher Esquire, O.L.S. showed:—

"(1) That the farm lands of the Appellants lie directly south of the school lands of the above named Separate School.

"(2) That the distance from the northerly limit of the Appellants' farm lands to the southerly limit of the school lands of the above named Separate School is less than three miles by 1215 feet.

"(3) That the distance from the northerly limit of the farm lands of the Appellants to the school building of the above named Separate School is less than three miles by 460 feet.

"(4) That the distance from the dwelling house on the farm lands of the Appellants to the school lands of the above named Separate School is less than three miles by 315 feet.

"(5) That the distance from the dwelling house on the farm lands of the Appellants to the school buildings of the above named Separate School is over three miles by 440 feet.

"(6) That measuring three miles from the southerly limit of the school lands of the above named Separate School would bring one to a point in the Appellants' farm lands 1215 feet within or south of their northerly limit and 315 feet south of the dwelling house on the farm.

"(7) That measuring three miles from the school building of the above named Separate School would bring one to a point in the Appellants' farm lands 560 feet within their northerly limit but 440 feet north of the dwelling house on the farm."

Upon these facts the learned County Court Judge held that the question whether or not the present appellants were entitled to be assessed as separate school supporters was *res judicata* because in the year 1948 he had decided that question on an identical appeal to him by these appellants respecting the assessment for that year. There had been no appeal taken from that

decision. In that earlier decision he had held in the manner indicated by the questions now submitted to this Court.

In the case now stated the learned County Judge submitted the following "Statement of Questions":

"Upon these facts and having regard to the relevant legislation, was I correct in holding that:—

"1. The matters raised in this Appeal are *res judicata*.

"2. For the purposes of the assessment in question, when construing Section 56 of The Separate Schools Act, R.S.O. 1937, Chapter 362, the word 'resides' is limited to the residence or dwelling house of the Appellants located on their farm lands and does not include the farm lands themselves.

"3. For the purposes of the assessment in question, the words 'site of the schoolhouse' as used in the above named Section 56 mean only the school building itself, exclusive of the lands used in conjunction therewith.

"4. For the purposes of the assessment in question, the three miles referred to in the above named Section 56 should be measured in a direct line from the school building to the house in which the Appellants reside."

Re Question Number 1.

In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same but also that there was an opportunity of recovering in the first action that which it is sought to recover in the second. In the case at bar a new liability has arisen which was not in existence in the earlier action, a liability of the same type but nevertheless new in every aspect and completely irrespective of the judicial determination made the previous year by the learned County Court Judge. Question no. 1, therefore, should be answered in the negative: *Canadian Leaf Tobacco Co. Ltd. v. The City of Chatham*, [1944] O.R. 458, [1944] 1 D.L.R. 145; *Broken Hill Proprietary Company, Limited v. Municipal Council of Broken Hill*, [1926] A.C. 94 at 100.

Re Question Number 2.

Section 57 of The Separate Schools Act, R.S.O. 1950, c. 356, reads:

"Subject to the other provisions of this Part, no person shall be deemed a supporter of a separate school unless he resides within three miles in a direct line of the site of the schoolhouse."

The terms "residence", "residing" and "resides" have been defined in various judgments, sometimes strictly, sometimes more liberally, inasmuch as they are governed by their object and intent as determined by a reading of the statute. I am of the opinion that in the instant case the word "resides" connotes residence on his property, *i.e.*, his whole property, his farm in the case at bar, and should not be construed by considerations so narrow as to exclude the properties surrounding his house and immediately adjacent thereto: see per Middleton J. in *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102.

Question no. 2 is answered in the negative.

Re Question Number 3.

I am of the opinion that the effect of the phrase "site of the schoolhouse" in s. 57 includes such adjoining property as may be necessary for a school site within contemplation of the interpretation of "school site" in The School Sites Act, R.S.O. 1950, c. 348, s. 1(d), which reads as follows:

"(d) 'School site' means the land necessary for a school-house, school garden, teacher's residence, caretaker's residence, drill hall, gymnasium, offices and play grounds connected therewith or other land required for school purposes or for the offices of a board."

I am further of the opinion that to limit the interpretation of "site of the schoolhouse" to the building itself, and to exclude the area immediately surrounding it and necessary for air, light and recreation, is a construction indefensibly narrow having regard to the object and intent of the statute: *The City of Victoria v. Trustees of Our Lord's Church in Victoria* (1915), 22 B.C.R. 174, 9 W.W.R. 173, 32 W.L.R. 330, 25 D.L.R. 617.

Question no. 3 is answered in the negative.

It necessarily follows from the answers to submitted questions 2 and 3 that the answer to question 4 also should be and is in the negative. The three-mile limit in the statute should be measured in a direct line from property to property.

The appeal should therefore be allowed with costs, and the matter should be remitted to the learned County Judge so that, on being certified thereof, he shall cause the proper entries to be made in the assessment roll to give effect to this judgment pursuant to s. 85(6) of The Assessment Act.

Appeal allowed with costs.

Solicitors for the appellants: McNevin, Gee & O'Connor, Chatham.

Solicitor for the respondent: James F. Twigg, Windsor.

[COURT OF APPEAL.]

Gotlieb et al. v. Goldfarb.

Landlord and Tenant — Termination of Tenancy — Term Certain — Right of Landlord where Rent in Arrear — Lease under Order 813, s. 5, The Wartime Prices and Trade Board — Order 800, s. 13(a) — Notice to Vacate—The Landlord and Tenant Act, R.S.O. 1950, c. 199.

The provision in a "Board lease" (i.e., a lease made in pursuance of s. 5 of Order 813 of the Wartime Prices and Trade Board) that the landlord may "terminate" the lease for circumstances there set out does not entitle a landlord whose tenant is in arrear for 15 days or more in payment of rent to give one month's notice to quit. The word "terminate", in the light of s. 5(4) of Order 813, must contemplate putting an end to the term by forfeiture. The lease is one for a term certain, and in the absence of an express power to terminate by notice there are only two methods of terminating a lease for a term certain for breach of covenant, viz., (1) by re-entry, and (2) by proceedings for possession or to declare a forfeiture. The giving of a notice to quit is not a re-entry, and proceedings for possession founded upon a failure to give possession pursuant to the notice, rather than upon the default in payment of rent, are not a means of terminating the lease.

AN APPEAL from the order of McDonagh Co. Ct. J., of the County Court of the County of York, dismissing an application for possession of rented premises.

6th March and 11th May 1951. The appeal was heard by ROACH, AYLESWORTH and MACKAY JJ.A. (Note: The second argument was directed by the Court, on the effect of the provision in the lease permitting the landlord to "terminate" it "for a circumstance referred to", *inter alia*, in s. 13(a) of Order 800 of the Wartime Prices and Trade Board, and whether or not

the case was governed by the decision in *Archibald v. Richardson*, [1946] O.W.N. 920. The second argument alone is noted.)

H. M. Finkle, for the landlords, appellants: On the termination of a lease by a landlord in circumstances in which he is permitted to do so, he is entitled to recover possession. [ROACH J.A.: Do you mean that where the rent is in arrear for 15 days the landlord may terminate a lease for a term certain?] Yes. It is to be noted that the word used in the clause is "terminate", which is entirely different from "forfeit" or "expire". If the lease is terminated there is no longer any relationship of landlord and tenant and the owner is entitled to possession.

In this case the lease was terminated by the happening of an event, that mentioned in s. 13(a) of Order 800 ([1949] S.O.R. 267). As soon as that event happened, the lease was terminated, subject to the landlord's taking some step. Here we served a notice demanding possession. [AYLESWORTH J.A.: Your argument is that upon the happening of the circumstance referred to in s. 13(a) the landlord may instantly determine the lease, with no requirement of notice?] Yes. Notice to quit is required only to terminate the relationship of landlord and tenant: Williams, *Canadian Law of Landlord and Tenant*, 2nd ed. 1934, p. 483. [AYLESWORTH J.A.: You cannot have it both ways. The non-payment of rent does not of itself terminate the lease. The document says that the landlord "may terminate" it. The question is what you must do to terminate it.] I refer to Woodfall on *Landlord and Tenant*, 24th ed. 1939, p. 892.

My submission is that the decision in *Archibald v. Richardson*, [1946] O.W.N. 920, does not apply here. In that case there was a monthly tenancy, but my position is that there is no longer any tenancy. The lease is wiped out, and the tenant is not entitled to relief of any kind except where the landlord is attempting to re-enter or forfeit the lease. Even in a case of forfeiture, where the tenant's whole defence is that there are no arrears of rent, and the Court finds that there are such arrears, the tenant is not entitled to relief: *Clarke v. Kirkpatrick et al.*, [1949] O.W.N. 526. That is the case here. The tenant says that there are no arrears of rent, but it is established that there are. Therefore the tenant is not entitled to be relieved from forfeiture.

J. D. Arnup, K.C. (L. J. Zuker, with him), for the tenant, respondent: The point that arises in this case has, so far as I am aware, never before been considered by any Court.

Order 813 of the Wartime Prices and Trade Board ([1949] S.O.R. 2810), as amended by Order 818 ([1950] S.O.R. 228), is the foundation for this lease, and prescribes the form. It provides that the tenant may terminate in circumstances there set out, but contains no provision for terminating the tenancy by notice before the end of the term. It is of interest to note that while the Order says that the lease may be terminated for stated "reasons", the form of lease uses the word "circumstance". I cannot account for this difference in wording. Another difference is that the lease requires acceptance within 30 days, while the section requires a clear month.

Clause (a) of the lease is a limitation of rights the landlord might otherwise have had under an earlier lease, and does not give him any substantive rights.

The word "terminate" in my submission is synonymous with "determine". All the English cases and texts starting with *Cole on Ejectment* use the word determine; see also *Murray's New English Dictionary*, s.v. "terminate" and "determine". To terminate or determine a lease is to put an end to the term of the lease.

This form of lease has been considered by this Court, but from different aspects, in *Grant et al. v. Rutledge et al.*, [1950] O.W.N. 560, [1950] 3 D.L.R. 447, and *Boegel v. Templar*, [1951] O.W.N. 164.

The words "may terminate for a circumstance" mean may terminate the lease during the term, i.e., put an end to the balance of the term. This is clearly a forfeiture: *In re Sumner's Settled Estates*, [1911] 1 Ch. 315. The correlative point, going with this, is that the granting of relief from forfeiture is the giving back of that which was forfeited: *Dendy v. Evans*, [1910] 1 K.B. 263.

There are two general observations to be made as to this right of forfeiture. There has never been in any Order of the Board a provision for the giving of notice by a landlord in a manner that was not valid under provincial law. In some cases (e.g., s. 15A of Order 800) a longer notice is required than that

called for under provincial law. It is also a fair statement to say that there has never been any provision that puts a tenant in a position inferior to his position at common law.

In the absence of an express and clearly-defined power to terminate on notice there were only two ways at common law for a landlord to determine a term-certain lease upon default or breach of covenant: actual re-entry or proceedings for possession or to declare a forfeiture. There is no provision in this lease for re-entry, but there is a statutory right under s. 17(1) of The Landlord and Tenant Act, R.S.O. 1950, c. 199. Any proceedings under the second head is in effect an action for ejectment: Woodfall on Landlord and Tenant, 24th ed. 1939, p. 892; Williams, Canadian Law of Landlord and Tenant, 2nd ed. 1934, p. 660, art. 107. A mere breach of covenant to pay rent does not of itself entitle a landlord to possession, and the tenant can put the lease in good standing by paying all arrears at any time until actual proceedings are taken: *Prudential Insurance Company of America v. McLean*, [1943] O.R. 377, [1943] 3 D.L.R. 307. Notice of re-entry is not a termination of the lease: *Winbaum v. Ginou and Ginou*, [1947] O.R. 242 at 245-6, [1947] 2 D.L.R. 619. Only actual proceedings for possession or physical entry can operate a forfeiture. The giving of a notice to quit is of no effect in this respect.

The effect of the occurrence of one of the events mentioned in the lease and in s. 13 of Order 800 is to enable the landlord to resort to the common law rights of a landlord under a term-certain lease, and no more—he has the right to terminate, or determine, the lease.

If the landlord had brought an application for possession on the basis of the arrears of rent, which he might have done, but did not, then the statutory provisions as to relief from forfeiture would apply, and we paid into court all the arrears and costs before judgment was given on the application, and gave notice that we asked for relief. This operates as an absolute stay: *Kamin v. Kirby*, [1950] O.W.N. 68, [1950] 2 D.L.R. 179.

Clarke v. Kirkpatrick, *supra*, is distinguishable in that there was no request for relief from forfeiture. The tenant insisted throughout that there was no rent in arrear.

H. M. Finkle, in reply.

Cur. adv. vult.

29th May 1951. The judgment of the Court was delivered by

ROACH J.A.:—This is an appeal by the landlord from an order dated the 30th October 1950, dismissing his application made under Part III of The Landlord and Tenant Act, R.S.O. 1937, c. 219, for possession of a dwelling in the city of Toronto, leased by him to the tenant for a term certain expiring on 14th May 1951.

The lease here in question came into existence in the manner following. The tenant was originally in possession under an earlier lease. Under date 10th March 1950, and on a form provided by the Wartime Prices and Trade Board, the landlord, in accordance with s. 5 of Order 813 of the Board ([1949] S.O.R. 2810), offered the tenant a further lease for a term commencing on 15th April 1950 and expiring on 14th May 1951, at a rental of \$71.09 per month, the same being an authorized increase of 18 per cent. That offer contained certain conditions, to one of which it will be necessary to refer hereinafter. The tenant accepted the offer with the conditions therein contained, and the new lease was thereby created.

Among the conditions contained in the offer was the following:

“(a) I may only terminate it [the lease] for a circumstance referred to in clauses (a), (b), (e), (f), (i) or (l) of Section 13 of Order No. 800 of the Board.”

The rent which was due on 15th July was not paid on that date. The tenant was spending the summer at or near Lake Simcoe, and on 25th July he sent a cheque to the landlord by registered mail, intending the same to be in payment of the rent which had become due on 15th July. However, there was insufficient postage on the envelope, and the postman would not deliver it to the landlord without the landlord first paying the additional postage which was required. This the landlord refused to do. In due course, the envelope containing that cheque was returned by the Post Office Department to the post office at or near Lake Simcoe from which it was originally sent.

On 12th August, the tenant sent the landlord a money order for \$71.09, intending, but not so saying, that it be in payment of the rent due on 15th August. On that date, namely, 12th August, the tenant had not yet learned that the cheque that he

had sent on 25th July had not been received by the landlord. The landlord applied the money order sent on 12th August against the rent which had fallen due on 15th July.

On 4th September, the landlord served the tenant with a notice to quit and deliver possession of the premises on 14th October. The notice stated that it was being given pursuant to s. 13(a) of Order 800 of the Wartime Prices and Trade Board ([1949] S.O.R. 267).

Having received that notice, the tenant at once made inquiries and for the first time discovered that the cheque which he had sent on 25th July had not been received by the landlord and that the money order which he had sent on 12th August had been applied on the rent which was due on 15th July.

The tenant not having vacated on 14th October, the landlord commenced these proceedings on 18th October. The application came on for hearing before the County Court Judge on 30th October. In the meantime, namely, on 24th October, the tenant paid into court the sum of \$228.27, and in the notice to the landlord of that payment the amount thereof is shown as being made up as follows:

"3 months' rent (at \$71.09 per month) for the months of August 15th, 1950, to November 14th, 1950	\$213.27
"Costs of these proceedings	15.00
"TOTAL	<u>\$228.27"</u>

On the application before the County Court Judge it was argued on behalf of the tenant that, having paid that money into Court, he was entitled to relief from forfeiture under s. 19 of The Landlord and Tenant Act. The County Court Judge refused to give effect to that argument and for such refusal he stated that he was relying upon the judgment of this Court in *Archibald v. Richardson*, [1946] O.W.N. 920. He, nevertheless, dismissed the landlord's application.

The reasons given by him are difficult to understand but they seem to be these, namely: that the landlord should have told the tenant that the rent for the month ending 14th August had not been paid, and that the landlord was not entitled to apply the money order sent on 12th August in satisfaction of the rent which had fallen due on 15th July but should have applied it on account of the rent due on 15th August. If that is what the

learned County Court Judge intended to say, with respect, he was wrong. There was no obligation on the landlord to notify the tenant that the rent which was due on 15th July had not been received, and the landlord was entitled to apply the payment received in August on the rent which fell due on 15th July.

Unquestionably, as of 4th September the tenant was in default in payment of rent for 15 days and longer. The primary question for determination on the landlord's application before the County Court Judge was, and on this appeal is, this: Having regard to that default, what was the landlord's right and did he avail himself of it?

The lease here in question was created under the authority of and in the manner set out in s. 5(1) of Order 813. Section 5(4) of Order 813 is in part as follows:

"The term-certain lease referred to in sub-section (1) of this Section may be terminated during its term for any of the reasons set out in clauses (a), (b), (e), (f), (i) or (l) of Section 13 of Order No. 800 of the Board but shall not contain any provision for its termination on notice by the landlord before the end of the term thereof. . . ."

Section 13 of Order 800 falls under a heading which reads "Dispossession under provincial law" and reads in part as follows:

"The landlord may recover possession of the accommodation in accordance with the law of the province in which it is situated if the tenant

"(a) is in default in payment of rent for fifteen days or longer". . . ."

The word "terminate" as it appears in condition (a) of the lease, in the light of s. 5(4) of Order 813, must mean to put an end to the balance of the term by forfeiture, and cannot mean to bring it to a close by a notice to quit on some future date prior to the end of the term. Plainly, the landlord did not intend to put an end to the balance of the term by a forfeiture. He intended to and did recognize the lease as still in existence notwithstanding the default, but required the tenant to surrender possession at the end of the lease month next following the date of the notice to quit. He apparently assumed that, though this was a lease for a term certain, he was entitled by reason of the

default to terminate the lease as if it were a lease from month to month in accordance with provincial law. There are cases of record in which it has been held that a tenant who was in possession under a lease from month to month, and who defaulted in the payment of the monthly rent for a period of 15 days or longer, lost the protection of the rental regulations and under provincial law the landlord was entitled to end the lease by giving one month's notice to quit. In those cases, the landlord of course would also have been entitled to declare a forfeiture and demand immediate possession.

It must be borne in mind that the lease here in question was for a term certain. It must also be borne in mind that the circumstance relied upon by the landlord, and referred to in s. 13(a) of Order 800, is a breach of covenant to pay rent. In the absence of an express and clearly-defined power to terminate by notice, there are only two methods of terminating a lease for a term certain for breach of covenant: first, by re-entry, secondly, by proceedings for possession or to declare a forfeiture: see Woodfall on Landlord and Tenant, 24th ed. 1939, p. 892; Williams, Canadian Law of Landlord and Tenant, 2nd ed. 1934, p. 419. The giving of the notice to quit was not a re-entry, and the proceedings for possession were not founded on the default in payment but on the default in giving possession pursuant to the notice to quit. Until the landlord had taken either of those two methods for terminating this lease, the tenant was entitled to pay up the arrears and thereby place himself in good standing under the lease.

This is not a case in which the tenant is required to seek relief from forfeiture, because the landlord was not attempting to forfeit the balance of the term.

The landlord misconceived the remedy that was open to him by reason of the default. The notice to quit availed him nothing.

Although the County Court Judge's reasons were wrong, he was nevertheless right in dismissing the application. The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the landlords, appellants: Henry Papernick, Toronto.

Solicitor for the tenant, respondent: Louis J. Zuker, Toronto.

[McRUER C.J.H.C.]

Re Bridgman and The City of Toronto et al.

Municipal Corporations—Building Restrictions—Withholding of Permit Pending Passing of By-law—Application to Court before By-law Passed — Whether Discretion of Court to be Exercised to Adjourn Application until Final Action on By-law.

Where a *mandamus* is sought to compel a municipality to issue a building permit and it is admitted that the existing by-laws do not prevent the type of building contemplated by the applicant, but the municipality asks the Court to exercise its discretion to adjourn the hearing until after final action by the municipality and the Municipal Board upon a by-law, introduced after the application for the permit and passed while the application for a *mandamus* was pending, which would have the effect of preventing the carrying on of the type of business contemplated by the applicant, the following principles are applicable: If it is clear that the municipal authority is taking an unbiased and objective view of the situation, and has made a decision in the exercise of its judgment, the Court should always adjourn the hearing. On the other hand, if it appears that the council is taking sides or proceeding otherwise than in the ordinary exercise of its function to decide what is right as between an individual landowner and the other inhabitants of the district, and particularly if it appears that the by-law is directed against the applicant personally, the final disposition of the application for a *mandamus* should not be delayed. *Re Robertson and The City of Toronto*, [1934] O.W.N. 429; *Re Metro Oil Ltd. and The City of Toronto et al.*, [1935] O.R. 137, 338; *Re S. E. Lyons Ltd. and The City of Toronto*, [1933] O.W.N. 330; *Re Skyway Drive-in-Theatres Limited and The Township of London*, [1947] O.W.N. 489, considered.

It is not proper for a municipal council, or a committee thereof, to refuse a permit for the installation of a boiler of a particular type, not because it is considered undesirable to have a boiler of that type operating in the area involved, or because the boiler does not measure up to the prescribed specifications as to safety, but because it is considered undesirable to have in the locality a business of the kind in connection with which the boiler is to be used. Such a refusal amounts to an attempt by the council or its committee to impose restrictions which can be validly imposed only by a by-law approved by the Ontario Municipal Board.

AN APPLICATION for an order requiring the City of Toronto and its Building Commissioner to issue a building permit.

11th, 15th and 18th May 1951. The application was heard by McRUER C.J.H.C., in chambers at Toronto.

J. T. Weir, for the applicant.

J. Johnston, for the respondents.

18th May 1951. McRUER C.J.H.C. (orally):—This is an application made by William E. Bridgman for an order of *mandamus* directed to the City of Toronto and Kenneth S. Gillies, its Building Commissioner, to issue a building permit.

The facts of this case are quite unusual. Mr. Bridgman is the owner of the premises known as 355 Eglinton Avenue West,

which were leased to Langley's Limited, who entered the premises on 1st August 1950, and now occupy them as a depot for receiving clothing for dry-cleaning and a place where spot and stain removing is done.

In October 1950 arrangements were made between Mr. Bridgman and Langley's Limited that an addition should be made to the premises for the purpose of operating a business of dry-cleaning and shirt-laundry.

The method of dry-cleaning that was proposed to be used was a mechanical operation. It was described in evidence before me and it may be summarized in this way: The clothing is placed in a unit that is about 8 feet long and 4 feet wide. Inside this is a drum or cylinder which revolves and outside the cylinder is a fluid. The clothes in the revolving cylinder are passed through the fluid. The fluid is a liquid known as perchlorethylene, which is a non-inflammable substance and is, according to Mr. Henning's evidence, used for the purpose of extinguishing fires.

After about ten minutes of operation the fluid is drained off and the revolution of the drum is continued in order to throw off by centrifugal force any remaining liquid that may be in the clothing. Following this air is passed through the clothing for the purpose of drying the garments and the vapour that is created is passed through a condenser so that the liquid may be reclaimed and the remaining air passes out through a vent. Mr. Henning says that there is no odour from the exhaust from the vent.

An application was made in October 1950, for a permit to build an addition to the rear of the premises for the purpose not only of carrying on a dry-cleaning operation of this character but also for the operation of a shirt-laundry business. The application was duly filed and considered by Mr. Gillies. Accompanying this application was a letter which reads:

"As we have taken a lease on the above property for a long term, and are desirous of using these premises for the purpose of establishing a package dry cleaning unit, in which we use a fluid which is used to put out fires. In other words, it is not inflammable.

"In addition to this we will have a two-girl unit for the laundering and finishing of shirts only.

"We propose to extend the building 40' to the lane and wish at this same time to apply for a permit to instal a small high pressure boiler.

"We trust that you will give this your immediate attention, as it is of great importance to us at this time to instal this plant as speedily as possible."

At that time a restrictive by-law no. 7734, was in force. This provided that no building in the area in question "shall be located, erected, or used as a stable for horses for delivery purposes, a laundry, a butcher shop, a store, a factory, a blacksmith shop, a forge, a dog kennel, or hospital or infirmary for horses, dogs or other animals on the property in that portion of the City formerly known as the Town of North Toronto, excepting such properties as are now covered by existing by-laws, and excepting the properties fronting upon each side of Yonge Street".

It is admitted, and it is common knowledge, that this by-law has been altered from time to time so as to change entirely the character of this portion of Eglinton Avenue, which is now a commercial centre where there are theatres, service-stations, retail stores and butcher-shops. But it was obvious that this application could not be granted because a laundry in that area was prohibited.

Accordingly the president of Langley's Limited, Mr. George S. Langley, wrote to Alderman Nash, the chairman of the Committee on Property, on 30th October stating:

"On September 20th, we leased the above mentioned property for a 10-year term, and are desirous of using these premises for the purpose of establishing a small safety solvent dry cleaning unit in which we use perchlorethylene or carbon tetrachloride, both of these solvents are in general use for fire extinguishing. This unit occupies a floor space of 8½' x 4'. In addition to this we will have a small unit for laundering and finishing shirts only.

"We propose to extend the building 40' to within 10' of the lane, and wish at this time to apply for a permit to instal a small high pressure boiler.

"This will be similar to our business now located and operating at 1534 Danforth Avenue.

"When this property was leased we believed that the restrictions in this area were no more severe than in the Danforth block. We are now advised that this property comes under By-law 7734.

"We appeal to you to amend By-law 7734, and ask that this matter be brought before the committee at Wednesday's meeting, November 1st.

"It is of great importance to us at this time to instal the equipment as speedily as possible."

On the same date a letter was written to the Property Commissioner, enclosing a copy of the letter to Mr. Nash.

It is to be observed that By-law 7734 does not specifically refer to dry-cleaning establishments.

Mr. Bland, Commissioner of Property for the Corporation of the City of Toronto, in an affidavit filed, states that on the 1st October he reported favourably to the Property Committee on the application to allow a laundry and dry-cleaning business at 355 Eglinton Avenue West, and "On the 13th . . . November 1950 the City Council passed By-law No. 18126 to amend By-law No. 7734 to permit a combined dry-cleaning plant and laundry" in the area in question. The amending by-law merely states that By-law 7734 shall not apply to prevent the use of any land or the erection or use of any building on any land abutting on the south side of Eglinton Avenue West, between Braemar Avenue and Elmsthorpe Avenue, for the purpose of a laundry; "and the said By-law No. 7734 is hereby repealed insofar as it prevents such use of any such land or the erection or use of any such building". Then it goes on:

"No person shall use any land abutting on the portion of Eglinton Avenue West mentioned in section 1 for the purposes of a laundry other than a combined dry cleaning plant and laundry."

Now it is quite obvious that that by-law was passed for the specific purpose of permitting Langley's Limited and the applicant for the permit to carry on, on the land in question, a combined business of laundry and dry-cleaning.

Mr. Bland says in his affidavit that no poll was taken of the neighbourhood before the by-law was passed, but one of his inspectors had visited a similar plant of Langley's Limited and

he was of the opinion that there would be no objection to the application.

When the matter went before the Ontario Municipal Board there was apparently objection from some residents in the area and the Municipal Board refused to ratify the by-law.

On the 23rd January 1951 Mr. Henning wrote to the Department of Buildings as follows:

"We would appreciate very much your permission to instal a model BF-100-3, 125 P.S.I high pressure Cleaver-Brooks steam boiler, using light fuel oil. This develops 30 boiler horse power, and we attach herewith their catalogue and a data sheet giving all details. This boiler is to be installed in the basement of the addition we are adding to the back of 355 Eglinton Avenue West, Toronto."

On the 26th January the City Clerk wrote to Mr. Henning:

"The Committee on Property at its meeting held on January 24, 1951, gave consideration to a communication received from the Commissioner of Buildings in favour of the application of Langley's Limited for permission to instal a Model B F-100-3 High Pressure Cleaver-Brooks steam boiler in the basement of store and dwelling building at No. 355 Eglinton Avenue West.

"The Committee decided to refuse the foregoing application."

It is to be noted that there were no reasons given to Mr. Henning for the refusal to permit the installation of the boiler.

On 16th February, Mr. Henning wrote to Mr. Gillies stating:

"We are going to open a small cleaning and pressing plant in the store which we occupy at 355 Eglinton Ave., West, and I would appreciate it very much if you would give us permission to instal a small steam generating boiler in the addition which the owner has agreed to have erected at the back of the store.

"The type of steam generator we anticipate installing is a Cleaver-Brookes."

There does not appear to be any reply to this letter.

Mr. Bland's affidavit states, after referring to the fact that By-law 18126 had not been approved by the Municipal Board, and that the city council had passed By-law 18189 repealing it:

"Some time later Mr. George S. Langley on behalf of Langley's Limited made application to the Committee on Property for permission to instal a high pressure boiler for a dry-cleaning plant at 355 Eglinton Avenue West.

"There was much opposition before the Committee by nearby property owners who were represented by counsel and were present in person as well. Notwithstanding the application was approved by the Committee on Property upon the favourable report of the City's Commissioner of Buildings. On the 5th day of March 1951 however the recommendation of the Committee on Property was referred back to the Committee by the City Council for further consideration."

It is not quite clear to me just what had taken place there, in view of the letter of the City Clerk of the 26th January, but Mr. Bland goes on to say:

"The Committee on Property then reconsidered the application and again recommended in favour. When the report of the Committee on Property came before the Board of Control, a deputation of objecting owners represented by counsel attended the meeting and a communication from the Oriole Park Neighbourhood Association objecting to the application was received. The Board of Control recommended that the application of Langley's Limited be refused and that the Committee on Property give consideration and study to placing further restrictions on the area in question to adequately protect it from the intrusion of uses considered by the residents in the area to be objectionable or detrimental to the district. The item in its amended form was passed by council on the 3rd day of April, 1951."

It is to be noted that the matter that was before the committee was not an application for a licence to operate a dry-cleaning plant in that area, nor was it a question of housing for such a plant, but it was an application for leave to install a high-pressure boiler. Mr. Bland further states:

"The Committee on Property then recommended imposing certain restrictions on the area and this was approved by Council on the 16th day of April 1951. On that day Bill No. 118 was accordingly introduced in Council to restrict the area in question including No. 355 Eglinton Avenue West inter alia against dry cleaning plants and was given two readings and adjourned for third reading."

That was the situation when this application came before me on 11th May.

The original application for the permit, although dated the 5th December 1950, was not amended until 2nd May 1951, deleting the words "laundry and", but it is to be observed that the negotiations that were being carried on with the City officials after the Municipal Board had refused approval of the by-law permitting a laundry in that area were based on an application for a permit for an extension of the building to house what is called "a package unit dry cleaning plant".

When the matter came before me on the 11th May the notice of motion asked for a *mandamus* directed to the City of Toronto and its Building Commissioner to issue a building permit. After Mr. Weir had completed his argument objection was taken by Mr. Johnston, counsel for the City, that Mr. Gillies had not been served with a copy of the notice of motion, and that there were what one might call trivial irregularities in the application which I do not think in the ordinary course would have been treated seriously.

Mr. Weir asked for an adjournment of the hearing to permit him to serve Mr. Gillies and correct these other slight irregularities by filing further material. I intimated that I would adjourn the motion until Tuesday, 15th May, and agreed with counsel as to when I would hear argument, but I assured counsel that I would make arrangements to hear argument at a very early date.

In the meantime the by-law came before the city council on 14th May and was passed but it has no effect under the terms of The Municipal Act, R.S.O. 1950, c. 243, until approved by the Ontario Municipal Board.

The principal argument addressed to me to-day has not been that under the terms of the restrictive by-law that was in existence when the matter came before me on the 11th May the applicant would not have been entitled to a *mandamus* but for these technical irregularities, but that I should exercise my discretion now and adjourn the hearing of this motion until after the by-law has been considered by the Ontario Municipal Board.

In addition to this, there were two other matters that Mr. Johnston argued on the merits that I shall deal with in due course, but I must first dispose of the question as to whether or not I will exercise the discretion that is vested in me to adjourn the hearing until after the by-law comes before the

Ontario Municipal Board, which may or may not ratify it, in the light of all the circumstances that have been placed before me.

There are certain cardinal principles that are never to be forgotten with respect to cases of this kind and with respect to all matters that the Courts have to deal with affecting property rights.

Everyone has a right to use his own property in any way that he may see fit, so long as he does nothing that will be a legal nuisance to his neighbours. That is a common law right. It is a question of liberty that is to be jealously guarded by the Courts, and while one's rights may be affected by proper legislative action, until that is done one's personal common law rights are to be strictly guarded. In the construction of any Act, either of the Legislature or of a municipal government which is limited in its legislation to the authority conferred on it, one must place a strict construction on any statute or by-law which is restrictive in its nature of the liberty of the subject or the liberty with which he may exercise those rights that the common law gives to him over his property.

In *Re Hartley and City of Toronto* (1924), 55 O.L.R. 275 at 278, Mr. Justice Middleton said: "The provision of the Municipal Act may work very harshly. It should, I think, be strictly construed and should not be held to apply to any case that does not fall clearly within its provisions." Mr. Justice Middleton's judgment was affirmed in the Court of Appeal (1925), 56 O.L.R. 433. Again in *Re Strcnach*, 61 O.L.R. 636 at 640, [1928] 3 D.L.R. 216, 49 C.C.C. 336 (*sub nom. Rex v. Stronach*), Mr. Justice Grant, in the Court of Appeal of the Province, said: "The law is also well established that common law rights are not held to have been taken away or affected by statute or by-law passed under its authority, unless it is so expressed in clear language, or must follow by necessary implication, and in such cases only to such an extent as may be necessary to give effect to the intention of the Legislature thus clearly manifest."

Those statements apply not only to the question whether I should exercise my discretion and postpone this hearing until after the Municipal Board has dealt with the by-law but also to some other aspects of Mr. Johnston's argument.

There have been some statements made in the decided cases with reference to the discretion I am called upon to exercise. In some cases it is proper to postpone the hearing having regard to all the circumstances and the facts, and in other cases learned judges have decided not to postpone the hearing or, I may say, the final judicial determination, until after the by-law had become legally effective. These cases all vary and I think the principle to be gathered from them is this: that if it was evident to the judge hearing the application for *mandamus* in circumstances similar to this that the municipal authority was taking an unbiased and objective view of a situation that had developed and in the exercise of its judgment had made a decision, a Court should always postpone the hearing—if that is clear. If, on the other hand, it appeared, as the late Chief Justice Rose said in *Re Robertson and The City of Toronto*, [1934] O.W.N. 429, that the city council was taking sides or proceeding otherwise than in the ordinary exercise of its function to decide what was right, having regard to the interests of all the inhabitants of the street, on the one hand, and the interest of the particular landowner on the other, then the final disposition ought not to be delayed. In *Re Metro Oil Limited and The City of Toronto et al.*, [1935] O.R. 137 at 139, [1935] 2 D.L.R. 208, affirmed [1935] O.R. 338, [1935] 3 D.L.R. 303, Kerwin J. said: "It is a matter of discretion and one that should, I think, be rarely exercised."

There is one thing that cannot escape one's notice in this case, and that is that the city council, exercising its judgment as to what was in the interests of all parties concerned, passed a by-law, specifically permitting not only a dry-cleaning plant but one to be operated together with a laundry without any particular limitation on the scope of the laundry.

The character of the area is also to be taken into consideration. The by-law that has been passed allows service-stations and theatres and automobile salesrooms and showrooms, together with any use that is accessory to any of these businesses (one can see the breadth of that); bowling-alleys, retail stores and bake-shops are also allowed.

When the application for permission to install a boiler came up for discussion it was refused, and counsel on argument before me quite freely admitted, and it is quite evident from the ma-

terial, that it was refused, not because it was considered undesirable to have a boiler of that type operating in that area or because the boiler was not one that would measure up to the specifications required for safety. In fact, it was a boiler for which permits had been obtained in many different plants in the city. But it was refused as a means of preventing this dry-cleaning plant being established in that locality.

When one follows that through, one sees what was happening: instead of at once passing a restrictive by-law for the good of the community, preventing dry-cleaning establishments in that locality, another method was resorted to which would not require the approval of the Ontario Municipal Board and yet would have the effect of imposing building restrictions in an area in a manner not permitted by statute; in other words, attempting to do indirectly that which apparently at that time the council was not willing to do directly. Then when the matter eventually developed and the by-law was given its first and second reading, but before it had been given its third reading, the application for the *mandamus* was brought. If this by-law is not directed against this applicant personally, what harm could have come from allowing the matter to stand until the adjourned motion was argued—that is, the motion which involved the question whether or not I should exercise a discretion to delay the matter until the final outcome of the proceedings before council and the Municipal Board? If it was a proper case for the exercise of my discretion for delay it would have been my duty to exercise it and the municipal council would have had an opportunity to pass a by-law and get it confirmed. But the by-law was passed while the matter was under consideration, after counsel for the applicant had completed his argument and pending the correction of what were purely formal matters.

It is a rather unhappy situation that I am put in. I should have liked to have been free to decide the matter of what I should do unfettered by any action in the interval.

The problem of the exercise of judicial discretion in such a case was considered by Mr. Justice Kingstone in *Re S. E. Lyons Ltd. and The City of Toronto*, [1933] O.W.N. 330, and on the facts of that case he did not exercise his discretion, and Chief Justice Rose in the *Robertson* case, *supra*, said that he would not have exercised a discretion in the *Lyons* case even if he had been

asked to do so, if he had been in the position that Mr. Justice Kingstone was.

A case in some respects not unlike this one came before my learned brother Gale in *Re Skyway Drive-in Theatres Limited and The Township of London*, [1947] O.W.N. 489, and he there considered the relevant authorities and came to the conclusion that the municipal council in that case was actually taking sides and was directing a by-law against a particular individual. He declined to exercise the discretion notwithstanding that the by-law had already been passed but not approved by the Ontario Municipal Board.

That case differs from the case I have before me to this extent, that before the matter came before the Court at all the by-law had been passed. In the case before me, when the matter first came before the Court the by-law had not been passed.

I have been referred to a judgment of Mr. Justice Gale in *Re Howard Furnace Co. and The City of Toronto*. This judgment is not reported but on the facts as indicated to me by counsel I must say that I can see no similarity between that case and the case that I have before me, or between that case and the case of *Skyway Drive-in Theatres Limited*. In the *Howard Furnace Co.* case a complete scheme had been laid out for the widening of the street, and all the facts went to indicate that the council had not in mind the particular individual but were directing the legislation towards a broad objective, to accomplish the widening of the street, and naturally the building involved was going to interfere greatly with that broad objective.

Having in mind all these authorities and the facts of the case as they have developed, I do not think, as it comes before me today, that I should exercise my discretion to postpone the hearing until after the Municipal Board has decided on the matter or dealt with it.

Now, that brings me to the question whether, on the facts as presented to me, the applicant is entitled to the relief asked. I have in mind the rigid requirements when making a mandatory order but with that one must also have in mind the authorities that I have already referred to with reference to the exercise of municipal powers interfering with the common law rights of property-owners. These powers are limited to the authority

given by the Legislature and must be exercised in conformity with the legislation conferring the powers, and when the powers are exercised in that way it is the duty of every Court to give full effect to them, and at no time to enter upon the wisdom of the exercise of the powers by any legislative body. Every legislative body in the exercise of the powers conferred on it should have the greatest respect not only of the Courts but of everyone. On the other hand the Courts are the only resort of the individual where he has been unlawfully deprived of his legal rights.

I think it is admitted that this application is now regular but it is contended that Mr. Gillies was justified in refusing the application for the permit on two grounds: in the first place, that a permit had not been obtained under the provisions of c. 36 of By-law 9868 regulating the erection and making provision for the safety of buildings; the title of the by-law is: "To Regulate the Erection and Provide for the Safety of Buildings." Section 6 of c. 1 of this by-law reads:

"If the matters mentioned in any application for a permit, or if the drawings, specifications or block plan or survey submitted with the application, indicate to the Inspector of Buildings that the work proposed to be done will not comply in all respects with the provisions of this By-law, he shall not issue a permit therefor, and no permit shall be issued until the application, drawings, specifications and block plan are made to conform to the requirements of this By-law."

Now, it is to be noted that this is a restrictive piece of legislation and again it is to be strictly construed. It is, if the application for the permit or if the drawings, specifications or block plan or survey submitted with the application indicate to the Inspector of Buildings that the work proposed to be done will not comply in all respects with the provisions of the by-law, he shall not issue a permit *until the application, drawings, specifications and block plan are made to conform with the requirements of this By-law.*

This application is not an application to operate a dry-cleaning plant. The application, as I have stated, is to build an addition to the rear of the store and dwelling building for dry-cleaning purposes. That is all the application is for.

Mr. Johnston relies on c. 12, s. 1, of the by-law which reads: "Before (a) any machinery, steam boiler, steam, gas or gasoline

engine, or any (b) forge, oven, hearth, kiln, furnace or chimney, for use in any blacksmith shop, foundry, bakery, brick yard, or other mercantile or other building or establishment, is installed, erected or constructed, a permit therefor shall be first obtained from the Committee on Property, the said permit to be subject to the approval of the City Council. It is provided that this requirement is not meant to apply to hot air furnaces, hot water boilers or low pressure steam boilers, which are used for heating purposes only."

Mr. Johnston argues that because there was a refusal of a permit to install a high-pressure boiler, the application for this permit does not comply with this by-law. If one follows that argument through to its logical conclusion it means this, that the Committee on Property may refuse a permit to install a high-pressure boiler and thereby disentitle an applicant for a *mandamus* to have built on his property a building in which a high-pressure boiler might be installed in the future. That would mean that the Property Committee, by superimposing its view on the council, could effectually restrict an area, which the council, as I have said, could not do, except by by-laws passed with the approval of the Ontario Municipal Board. I think that is the only logical conclusion from this argument.

It was said in argument in reply to that suggestion, "But the permit is to have the approval of the city council." That is, when it is granted, but suppose the Property Committee refuses to grant it, then the Property Committee is put in a position that they can control the use to be made of property by refusing a permit for the machinery to be later installed. The permit is to be obtained before the boiler is installed, not before the permit is issued to build the building in which it is to be installed. I am not dealing at all with the powers of the committee to deal with a situation that develops when there is a building in which machinery is to be installed; I am dealing purely with the right of the Property Committee to control the erection of buildings by a refusal under s. 1 of c. 12 of this by-law, or even the right of the city council itself, without the approval of the Municipal Board, to control the user of land by virtue of this particular section. I think the meaning and force of that subsection is this, that when there is a building in which any machinery, steam boiler, steam, gas or gasoline engine etc.

is to be installed, the committee must then consider whether the nature of the machinery is sufficient to meet its approval, and the requirements laid down in that chapter, but I do not think that chapter can be used for the purpose for which it was used in this case—to control the purpose for which buildings are to be used before a permit is granted. I may say that I asked Mr. Johnston to give me any judicial authority that would support his argument with respect to the application of the doctrine that he put forward and he had none. I am not surprised that there is none.

The same argument is advanced relying on s. 6 of c. 36 as a foundation. Section 6 provides:

“No person shall establish, set up, carry on or continue a dry cleaning plant or business, a moving picture film exchange, a tannery, a fellmongery or a place for boiling soap, making or running candles or melting tallow, a coal oil refinery, or a manufactory of varnish, fireworks, or other material which from its nature will be dangerous in causing or promoting fires, unless a permit so to do has first been obtained from the Committee on Property and City Council.”

In this case the permit must be obtained from the committee and the city council. This is in a chapter that is headed, “Factories, Warehouses, Workshops, Stores, Stables, Garages, etc.” Again, I do not think that on a strict construction of this section either the council or the Property Committee can properly say, “You cannot build a building to be used as a dry-cleaning plant because you have not first got a licence.” I would have thought the first thing the council and Property Committee would want to know before granting a licence would be what sort of a building the plant was installed in, what the character of the plant was and what the dangers would be from its operation.

The words are, “No person shall establish, set up, carry on or continue a dry cleaning plant or business”. The erection of a building for the purpose of housing a dry-cleaning unit such as this, which may never be there because there may never be a permit issued under this section (this process may not conform to the standard set up by the Property Committee), is one thing, and establishing, setting up, carrying on, and continuing a dry-cleaning plant or business is another. I do not think the

erection of a building with the objective of housing a dry-cleaning plant is "establishing, setting up, carrying on or continuing" a dry-cleaning plant. That is what follows after the building is put up, and that is a matter with which I do not have to concern myself on this motion, nor is it a matter that concerns Mr. Gillies when considering the application for a building permit.

Accordingly I think none of these objections which are put forward by Mr. Johnston for the first time according to judicial precedent of which he has knowledge (I am sure he has a comprehensive knowledge of them) can avail the defendants in the defence to this application.

Therefore, in dealing with the matter on the law as it stands today I find that the applicant is entitled to the order and that one should issue accordingly. The applicant will have the costs of the proceedings.

[Discussion followed as to a stay.]

The endorsement I have made on the notice of motion is: "Application granted with costs. 15 days' stay on the undertaking that, if there is an appeal from this order, the appeal will be completed and set down by May 31st, 1951."

Order accordingly.

Solicitors for the applicant: Mason, Foulds, Arnup, Walter and Weir, Toronto.

Solicitor for the respondents: W. G. Angus, Toronto.

[COURT OF APPEAL.]

Laurie v. Bowen et al.

Easements—Creation—Express Grant, not Embodied in Conveyance of Land—Grant Silent as to Dominant Tenement—Admissibility of Extrinsic Evidence to Supply Omission—Inadmissibility for Other Purposes.

Where a right of way is created by deed the language used must be looked at in the first instance to discover the nature and extent of the easement. If the language used is plain and unambiguous, and no doubt arises as to its meaning, no further evidence of any kind can be admitted. But if, on the face of the document, it appears that the words may be used in some sense other than their natural meaning, or if there is some ambiguity or omission apparent in the document itself, then the circumstances existing at the time of its execution may be considered, but only for the purpose of removing the ambiguity or supplying the omission.

Where, therefore, a deed purporting to grant an unlimited right of way was expressed in clear and unambiguous terms but contained no reference to a dominant tenement, *held*, evidence of the surrounding circumstances was admissible to supply that omission, and to establish the intention of the parties as to the lands to which the right of way should be appurtenant, but not to limit either the nature or the extent of the right of way granted.

An easement may be created either by inclusion in a conveyance of the dominant tenement or by deed separate and apart from such conveyance. Although the grant of an easement *per se* is unusual, and is not the best practice, it is nevertheless valid and effectual. Neither *Naegele v. Oke* (1916), 37 O.L.R. 61, nor *Conn v. Zostantos*, [1950] O.W.N. 277, is an authority to the contrary.

Judgment of McRuer C.J.H.C., [1950] O.R. 626, reversed.

AN APPEAL by one of the defendants from the judgment of McRuer C.J.H.C., [1950] O.R. 626, [1950] 4 D.L.R. 577.

5th and 6th December 1950. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and GIBSON JJ.A.

N. L. Mathews, K.C. (G. W. Gorrell, with him), for the defendant Winch, appellant: We accept the findings of fact of the learned trial judge, but not the inferences he drew from those facts.

There are four things that show that the document of 21st September 1925, on which we rely, was a grant of a right of way, not a mere personal licence: (1) The document expressly purports to grant a "right of way", not a personal licence. (2) The grant is in favour of Smith, "his heirs executors and assigns"; if, as the trial judge found, it was a mere personal licence, and not assignable, these last words would be contradictory. [LAIDLAW J.A.: Is there any evidence as to whether or not the document was drawn by a solicitor? To a layman the words "right of way" might mean what is in law a mere licence.] It is questionable whether a layman could have drawn it. If it was drawn by a layman, he must have had some legal knowledge;

it is under seal and there is an affidavit of execution, although the latter is not sworn. (3) It is expressly stated, in a separate sentence, that the grant is to be binding on the grantor's "heirs executors or assigns". This again is directly contradictory to the idea of a mere personal licence. [LAIDLAW J.A.: These matters might all be explained if it were known that the document was drawn by a layman. The important thing is to show that there was a dominant tenement in the minds of both parties.] [ROBERTSON C.J.O.: I think the learned trial judge thought that so much was omitted from the document that was essential to the proper grant of an easement that what was expressed was sufficient only to operate as a personal licence. He clearly was of the opinion that it was not shown that the parties had in mind a specific dominant tenement.] Whatever the parties had in mind, it was not a personal licence. (4) The right of way is described in the document as "perpetual".

The trial judge rightly held that a right of way could be validly created by grant, without the specifying of the dominant tenement in the same instrument. Counsel for the respondent does not dispute this, so I shall not cite the authorities for that proposition unless the Court wishes me to. [LAIDLAW J.A.: You must prove clearly both that the parties did have in mind a dominant tenement and what that dominant tenement was.] Yes. It must be shown that the parties realized that the right of way was for the benefit of particular land, although they need not necessarily have realized that it was to be called a dominant tenement. As to what the dominant tenement was, it is necessary only that the grantee of a right of way have some estate or interest in it, and assuming that the dominant tenement was the land owned jointly by Mr. and Mrs. Smith, or any part of it, Smith had a half interest in that land as a joint tenant. [ROBERTSON C.J.O.: Sheppard did not give Mrs. Smith any right to use Lot 33; he made it a personal matter with Smith.] That may be a matter of bad conveyancing only. It was obviously not intended that Smith should be able to use it, and Mrs. Smith should not. According to its terms, Smith could have given her an immediate assignment.

There were two parcels of land, abutting on Lot 33, in which Smith had an interest—the land immediately to the east, now on Plan 320, and Lot 17, Plan 103, immediately to the west.

Both parcels were used in connection with Lot 33. [ROBERTSON C.J.O.: Is it important to you to have Lot 17 as a dominant tenement?] I do not think so. My point is that there are only the two abutting properties, and that Smith had an interest in both of them. Lot 17 was merely a roadway and was in itself useless to Smith except as a means of access to the lake. Therefore, since the only possible use of Lot 17 was as a right of way, it was not the dominant tenement, and the only land that could come within that description was the farm land to the east. The only other purpose for which Smith could use Lot 17 was to go down to the Mahoney side-road.

The right of way over Lot 17 was clearly intended to be appurtenant to the land to the east, because Lot 33 was fenced on the east side except at what is now Lakeview Road, where there was a gate. It is not too great an inference for the Court to hold that the dominant tenement was the land on which the gate opened. As far back as the witnesses could remember there was a lane down what is now Lakeview Road, across Lot 33, and down Lot 17 to the lake. The only inference we ask the Court to make is what the dominant tenement was. [ROBERTSON C.J.O.: And the use the grantee could make of it.] No, only the location of the dominant tenement. To protect his right to continue to use his land to get to the lake, Smith purchased a right of way over Lot 33. [LAIDLAW J.A.: He had used Lot 17 for seven years before he bought it, and he did not even then immediately get his right of way over Lot 33.] He bought Lot 17 from Lascelles immediately after Sheppard sold it, to protect his access to the lake, and he obtained the right of way over Lot 33 less than a year later to complete his access. [GIBSON J.A.: Your point is that he had to buy Lot 17 because its sale to Lascelles shut him off from the lake?] Exactly.

If the Court decides that there was a dominant tenement, and that it was the land to the east of Lot 33, there can be no doubt that the document is a valid grant of a right of way. That being decided, our submission is that the right of way so created is unlimited. [ROBERTSON C.J.O.: Do not the cases say that the right of way to be inferred is the right of way that was actually in existence at the time?] The cases cited on this point were none of them cases where there was an express grant; they were all cases where a right of way arose by user,

prescription, or implied grant. *Cannon v. Villars* (1878), 8 Ch. D. 415, for example, was a case of implied grant. In such cases the Court must of course infer what user was contemplated, but that rule does not apply to an express grant, where the wording is clear and unambiguous, as here. The Court need not, and may not, look outside the grant itself. Where a right of way is acquired by express grant it is unlimited unless the grant expressly limits the user to be made. Here, once the existence and location of the dominant tenement is established, there is no need for an inference as to user, because the document itself is clear. As to what legitimate burden can be placed on the servient tenement, we refer to *Gale on Easements*, 11th ed. 1932, pp. 340-8. If the grantor does not limit the use that may be made of the right of way it must be construed in the way that will give the grantee the greatest advantage, and against the grantor.

We rely on *Williams v. James* (1867), L.R. 2 C.P. 577; *Callard v. Beeney*, [1930] 1 K.B. 353; *Wood v. Saunders* (1875), L.R. 10 Ch. 582; *Morris v. Edgington* (1810), 3 Taunt. 24, 128 E.R. 10; *Ardley v. Guardians of St. Pancras*, [1870] W.N. 203; *Bayley v. Great Western Railway Company* (1884), 26 Ch. D. 434; *Henning v. Burnet* (1852), 8 Exch. 187, 155 E.R. 1313; *The South Metropolitan Cemetery Company v. Eden* (1855), 16 C.B. 42, 139 E.R. 670.

Allan v. Gomme and Darvell (1840), 11 Ad. & El. 759, 113 E.R. 602, which is to the opposite effect, has been frequently distinguished or doubted. *Great Western Railway Company v. Talbot*, [1902] 2 Ch. 759, and *Taff Vale Railway Company v. Canning*, [1909] 2 Ch. 48, have also been distinguished.

See also *United Land Company v. Great Eastern Railway Company* (1875), L.R. 10 Ch. 586; *Finch et al. v. The Great Western Railway Company* (1879), 5 Ex. D. 254; *White v. Grand Hotel, Eastbourne, Limited*, [1913] 1 Ch. 113, affirmed 84 L.J. Ch. 938, 110 L.T. 209; *South Eastern Railway Company v. Cooper*, [1924] 1 Ch. 211; *Dand v. Kingscote* (1840), 6 M. & W. 174, 151 E.R. 370; *British American Oil Co. Ltd. v. Toronto Terminals Railway Co.* (1927), 32 O.W.N. 234.

Gordon N. Shaver, K.C. (F. W. Bartrem, K.C., with him), for the plaintiff, respondent: We rely in the main on the reasons of the learned trial judge.

Four matters have been mentioned as indicating that the document of 21st September 1925 was not a mere personal licence, but there are more indications that it was such a licence. It was given to John Smith alone, although the farm lands to the east, and Lot 17, were owned by Smith and his wife as joint tenants. No one knows where the document was from 1925 to 1945. There was no sworn affidavit of execution. It was a very informal document which started out as a letter, and might have been drawn either by Sheppard or by a conveyancer, but was almost certainly not drawn by a solicitor.

The finding that the document created a mere personal licence is a finding of fact, and to upset it the appellant must at least show that the preponderance of evidence is against the finding. All that the appellant can offer is mere speculation.

To show that the document is a grant of a right of way, creating an easement, the appellant must show that both Sheppard and Smith had a dominant tenement in contemplation. He must also show what that dominant tenement was. He could have done this by negative evidence, but no one was called at the trial to show that Smith owned no property other than Lot 17, and the farm land to the east, to which the grant could have been appurtenant. The burden was on the defendants and it was not met. No one actually knows who owned Lot 17 at the time of the 1925 document, since there is no evidence of the date of delivery of the deed to Smith.

There is no definite evidence of early user across Lot 17. The evidence does not support the suggestion that there had been a continuous user down to the farm lane, over Lot 33, and down Lot 17 to the lake.

The lands to the east have changed in character from a farm to a real estate subdivision. Even if it were to be held that the original document created a right of way, this constitutes a change in user and such an increased burden on the servient tenement that it cannot be supported. [LAIDLAW J.A.: The appellant contends that once it is established that a right of way was created by express grant there is no limit to the user unless that limitation is set out in the grant. The document here clearly contains no limitation.] It must be interpreted in relation to the character of the dominant tenement.

I rely on *Allan v. Gomme and Darvell* (1840), 11 Ad. & El. 759, 113 E.R. 602; *Henning v. Burnet* (1852), 8 Exch. 187, 155 E.R. 1313; *Milner's Safe Company, Limited v. Great Northern and City Railway Company*, [1907] 1 Ch. 208; 11 Halsbury, 2nd ed. 1933, p. 317. I concede that such a document must be construed against the grantor, but it must be construed according to the circumstances.

Finch et al. v. The Great Western Railway Company (1879), 5 Ex. D. 254, was distinguished in *Harris v. Flower* (1904), 74 L.J. Ch. 127. [LAIDLAW J.A.: That is not this case at all. There is no suggestion here of any attempt to attach this right of way to any lands other than the original dominant tenement.] It is a question of the user being increased. The nature of the right must be determined according to the character of the dominant tenement.

The learned trial judge was right in finding that the document was so imperfect that it could be construed only as granting a personal licence, and that only by speculation could a dominant tenement be found. Even if the Court did make that speculation, however, the right of way should be held to have been destroyed by the great increase in user.

N. L. Mathews, K.C., in reply: It was not necessary for us to show that Smith did not own other property. We had shown that he owned land abutting on Lot 33, and that was sufficient: *Adamson v. Bell Telephone Co. of Canada; Bell Telephone Co. of Canada v. Adamson* (1920), 48 O.L.R. 24, 55 D.L.R. 157.

As to the possibility that Smith may not have been an owner of Lot 17 when the right of way was granted, that would make our position even stronger, because it would lead to the inference that Lot 33 must have been in contemplation as the dominant tenement.

As to the trial judge having found as a fact that the document granted merely a personal licence, the finding is not one based on credibility, but is the result of inferences drawn from the established facts, and this Court is therefore in as good a position as the trial judge. The finding that the change in character or user extinguished the right of way is a finding of law, not one of fact.

I refer also to *Newcomen v. Coulson* (1877), 5 Ch. D. 133; *Telfer v. Jacobs et al.* (1888), 16 O.R. 35.

Cur. adv. vult.

2nd May 1951. ROBERTSON C.J.O. (*dissenting in part*):—
This is an appeal by one of the defendants, Perry Winch, from the judgment of the Chief Justice of the High Court, dated 10th July 1950, whereby it was declared that the defendants other than the defendant Earle Weddell have no right of way over a certain parcel of land in the township of North Gwillimbury, being Lot 33 on registered Plan 103, appurtenant to lands owned by the respective defendants other than the defendant Weddell. The judgment also ordered that the defendants other than the defendant Earle Weddell be perpetually restrained from using the said parcel as a means of egress and ingress as appurtenant to their lands, shown on registered Plan 320.

The defendant Earle Weddell was mortgagee of certain lands on Plan 320. It was ordered that he be added as a party defendant in the action, and he was served with the writ, but did not enter an appearance. He had notice of trial but did not attend the trial, and no order was made in respect of him. It was said that his mortgage had been paid off, and that he had no further interest.

The plaintiff is the owner of Lot 33 on Plan 103, registered in the Registry Office for the North Riding of the County of York, over which lot the defendants have claimed a right of way. There are five defendants, each of whom, other than Earle Weddell, is the owner of one or more lots on Plan 320, also registered in the Registry Office for the North Riding of the County of York.

The lands on Plan 320 (made after Smith's death) lie to the east of the lands on Plan 103, and immediately adjoin Lot 33 on Plan 103. The lands shown on each plan were formerly the property of O. B. Sheppard and, with other lands belonging to him lying still further to the east, formed his farm. Plan 103 is a subdivision of part of his land lying immediately to the east of the Lake Shore Road running along the eastern shore of Lake Simcoe. This subdivision was made by Mr. Sheppard in 1909. From time to time he sold lots on this plan to purchasers who built summer residences there. Mr. Sheppard had his farm buildings on that part of his land that

lay to the east of Plan 103. A lane ran from these buildings westerly to a gate in the fence that formed the easterly boundary of Lot 33 on Plan 103. Through this gate, westerly across Lot 33, lay Lot 17 on Plan 103. Lot 17 extended westerly to the Lake Shore Road. Mr. Sheppard retained both Lot 33 and Lot 17 in his ownership for a number of years. In 1917 Mr. Sheppard sold his land lying to the east of Plan 103 to John Smith and his wife as joint tenants. Smith had been his tenant of the farm for a period of years immediately before the purchase. There was no grant to Mr. and Mrs. Smith, at this time, of any right of way over Lot 33, to give access to the Lake Shore Road by the lane leading from the farm buildings to the gate. The side-road between Lots 15 and 16 runs along the south boundary of the farm that gave an outlet to both the east and the west.

It was not until September 1925 that Smith obtained from Mr. Sheppard any grant of a right of way over Lot 33 on Plan 103. That is by the document (ex. 3), dated 21st September 1925, upon which the defence to this action has been mainly based. That document is, however, lacking any reference to a dominant tenement, a matter of importance in the grant of a right of way. The defendants' effort in this action has been largely to supply that lack. At the same time that the defendants have contended for a dominant tenement, they have also contended for a use of Lot 33 as a right of way more extensive than any that either Sheppard or Smith is shown to have made of it.

I have had the privilege of reading the reasons for judgment prepared by my brother Laidlaw. While I agree in the result reached by him in respect of what is probably the matter presently of most importance, I find myself unable to go the whole way with him in disposing of the action. The evidence does not, I think, warrant the conclusion that at the time O. B. Sheppard signed the document dated 21st September 1925, purporting to grant a perpetual right of way over Lot 33, Plan 103, there was any right of way, or had been any right of way over Lot 33 in use as appurtenant to the farm property that Sheppard had conveyed to Smith and his wife in 1917, except the right of way connecting with the lane that commenced at the farm buildings and extended to a gate in the fence on the

eastern boundary of Lot 33, Plan 103. Smith had no legal title to use that right of way, but there is some evidence that he used it. The right of way over Lot 33 commencing at this gate extended across Lot 33 to the easterly boundary of Lot 17, Plan 103. Mr. Sheppard had retained Lot 17 as his own until September 1924, when he sold it to one Lascelles. It was acquired by Smith and his wife from Lascelles by deed dated 29th November 1924, but not registered until 17th October 1925. Lascelles had acquired Lot 17 by purchase from Sheppard, by deed dated 9th September 1924, also not registered until 15th October 1925.

The grant of a right of way by the document of 21st September 1925 does not purport to grant more than one right of way. It did not grant multiple rights of way. The words of the document are "a perpetual right of way over Lot thirty-three (33), Plan One hundred and three (103)". This conveyed only one right of way—a right of way that, by the conduct of the parties, was definitely located as commencing at the gate already in place on the east boundary of Lot 33, and extending westerly across Lot 33 to Lot 17 on Plan 103. There is nothing in the grant that supports the creation of some one or more additional rights of way running on other courses and with other termini.

There is no evidence that after 21st September 1925 Smith used Lot 33 any more extensively or, as a means of ingress or egress to or from his farm, in any other manner or by any other route than before. There was a wire fence extending along the east boundary of Lot 33 that prevented access from the farm to Lot 33 except by way of the gate at the end of the farm lane. This condition of affairs continued as long as Smith lived. He died in 1943.

There is some evidence by the witness Mrs. Bray, who is a niece of Smith. She was adopted as his own child and lived on the farm for many years. She was often set to guard Smith's cattle at pasture on Lot 33, which was a grassy place. Her task was to see that the cattle did not wander off Lot 33 and get out to the lake. This was not, however, a use of Lot 33 as a means of ingress and egress. Smith was then enjoying the privilege of a *profit à prendre*.

The evidence in relation to the document of 21st September 1925 is scant. There is no evidence as to who drew it, or on whose instructions it was drawn. There is no evidence that it was ever in Smith's possession. He never registered it. It was not registered until after his death, and then by the purchaser from his executors. There is no explanation why it was not registered, particularly when the deeds by which Lot 17 became Smith's property, making access to the Lake Shore Road available, were registered within a month of the date of the document of 21st September 1925. They are both dated in the preceding year. I can find no evidence on the record as to who had possession of the document in Smith's lifetime, or at his death. It is only by inference that the intention of the parties as to the dominant tenement, and the use to be made of Lot 33 as a right of way, can be determined. In my opinion such evidence as there is carries the matter of the use to be made of Lot 33 as a right of way no further than the use being made at the time, and continued for almost 20 years afterwards, when Smith died. There is in my opinion enough to warrant that much but no more.

There is difficulty in rectifying this document. First, there is no evidence of any antecedent agreement between the parties that they intended to put in writing. There is no evidence that the parties had any discussion about it. Then, it is a voluntary deed and no equity is shown in Smith upon which to base a claim for rectification: see *Brown v. Kennedy* (1863), 33 Beav. 133, 55 E.R. 317, and *Turner v. Collins* (1871), L.R. 7 Ch. 329. The evidence is clear that Lot 33 was fenced on its easterly boundary throughout its length, for many years after September 1925, and that there was only one means of entry upon Lot 33 from the farm land lying to the east of it, and that was through a gate opposite Lot 17.

I am not able to agree that the document of 21st September 1925 can be used as conferring any greater or other right of way in respect of Lot 33. This limitation may not seriously interfere with the use presently made by the appellant of the right of way across Lot 33 to Lot 17 and thence to the Lake Shore Road.

The other defendants who have not appealed are, I think, properly dealt with by the judgment of the learned trial judge.

I would alter the judgment in a manner to limit the appellant's right of way as I have indicated, and I would give no costs to either party.

LIDLAW J.A.:—This is an appeal by Perry Winch, one of a number of defendants, from a judgment pronounced by the Chief Justice of the High Court on the 10th July 1950, whereby it was declared that the defendants (other than the defendant Earle Weddell, who was a mortgagee who had been paid off and had no further interest in the matters in issue) have no right of way over a certain parcel of land situate in the township of North Gwillimbury and being composed of Lot 33, according to registered Plan 103, as appurtenant to any lands owned by the defendants (other than the defendant Earle Weddell) on registered Plan 320.

The learned Chief Justice in his reasons for judgment (reported [1950] O.R. 626) traced the chain of title from the year 1910 of the lands owned by the respective parties. I find it unnecessary to review or restate the facts in detail. It is sufficient to make a very brief statement.

O. B. Sheppard was the owner of Lot 33, Plan 103, in the township of North Gwillimbury on 21st September 1925. John T. Smith and his wife Edna Smith were the joint owners of adjoining farm lands. On that date Sheppard executed under seal an instrument which I reproduce as follows:

"In Consideration of the Sum of One dollar receipt of which is hereby acknowledged I hereby give to John Smith of the Township of North Gwillimbury in the County of York and province of Ontario his heirs executors and assigns a perpetual right of way over Lot thirty three (33) Plan One hundred and three (103) registered said Lot & Plan in the Township of North Gwillimbury in the County of York and Province of Ontario. This to be binding on my heirs executors or assigns."

The defendants rely upon that instrument as a source of title to a right of way over Lot 33 as appurtenant to lands owned by them which, at the date of the instrument, were part of the farm lands owned by Smith and his wife.

The learned Chief Justice expressed his opinion and conclusion in these words:

"I do not think there is any evidence on which I could find within the authorities that there is a right of way over any

portion of lot 33 appurtenant to the lands to the east thereof. My view is that the document of the 21st September 1925 only created a licence which was unassignable and was extinguished on the death of the grantee."

He then said that in case he was wrong in that conclusion, the right of way created by the instrument would be "a very limited one and not one extending to what is contemplated in this case".

It will be helpful to restate and bear in mind certain well-settled and accepted principles which I shall later apply to the facts of the present case.

First. There can be no such thing as an easement in gross. An easement can only be claimed as accessory to a tenement. There can be no easement, properly so called, unless there be both a servient and a dominant tenement: *Rangeley v. Midland Railway Company* (1868), L.R. 3 Ch. 306 at 310; *Todrick v. Western National Omnibus Company, Limited*, [1934] 1 Ch. 190 at 201; Gale on Easements, 12th ed. 1950, p. 12.

Second. An easement may be granted separately and apart from a conveyance of the dominant tenement or may be included in a conveyance of it: Gale, *op cit.*, p. 70. I pause to say that it was not decided to the contrary in *Naegele v. Oke* (1916), 37 O.L.R. 61, 31 D.L.R. 501, or in *Conn v. Zostantos*, [1950] O.W.N. 277. The language used in the judgments in those cases was intended only to mean that the grantee of a right of way must have an estate or interest at the time of the grant in a specific dominant tenement to which the right of way is appurtenant.

Third. In ascertaining the extent of a right of way there is a distinction between a right of way acquired by user and a right of way acquired by deed. "Where the extent of the right is to be inferred from user, it is for the jury, or, in the absence of a jury, the Court exercising the functions of a jury, to say, under all the circumstances attendant upon the user, *what is the right*. Where the right is conferred by deed, the deed itself must be looked to for the same purpose." Gale, *op cit.*, p. 306.

Fourth. Where a right of way is created by deed, the language used in the document must be looked at in the first instance to discover the nature and extent of the easement. If on the face of the document no doubt arises as to the

meaning of the words, and the language used is plain and unambiguous, no further evidence of any kind can be admitted to show that the document does not or was not intended to create the easement in the exact terms of the primary meaning which the words bear; but if, on the face of the document, it appears that the words may be used in some other sense than that which they would naturally bear, or if there is some ambiguity or omission apparent in the document itself, then the circumstances existing at the time when the instrument was executed may properly receive attention: Gale, *op cit.*, p. 72.

Fifth. If there is no limit in the grant creating the right of way, full effect must be given to it.

In *United Land Company v. Great Eastern Railway Company* (1873-5), L.R. 17 Eq. 158; L.R. 10 Ch. 586, the general principle is explained by Mellish L.J. in these words: "No doubt there are authorities that, from the description of the lands to which the right of way is annexed, and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes. But if there is no limit in the grant, the way may be used for all purposes."

In *White v. Grand Hotel, Eastbourne, Limited*, [1913] 1 Ch. 113, affirmed 84 L.J. Ch. 938, 110 L.T. 209, Cozens-Hardy M.R. said: "It is a right of way claimed under a grant, and, that being so, the only thing the Court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant. . . ."

See also *South Eastern Railway Company v. Cooper*, [1924] 1 Ch. 211; *Kain v. Norfolk et al.*, [1949] Ch. 163.

Sixth. If a severance of the dominant tenement takes place, all its easements which are attached to the tenement and not to the person of the owner will attach to the several portions: *Codling v. Johnson* (1829), 9 B. & C. 933, 109 E.R. 347; *Harris v. Drewe* (1831), 2 B. & Ad. 164, 109 E.R. 1104; *Newcomen v. Coulson* (1877), 5 Ch. D. 133 at 141; see also *Bower v. Hill et al.* (1835), 2 Bing. N.C. 339, 132 E.R. 133, and *Menzies v. MacDonald* (1856), 2 Jur. N.S. 575, showing that the limits of the right existing at the time of the severance cannot be exceeded so as to impose an additional burden on the servient tenement.

I proceed now to apply these principles. It will be observed at once that the right granted by the instrument dated 21st September 1925 possesses certain characteristics which belong to an easement and not to a personal licence. The grant is of a "right of way". It is described as "perpetual". The right is given not only to John Smith but also to "his heirs executors and assigns". Those provisions in the instrument are not consistent with the view that the parties intended the grantee to have only a personal licence to use Lot 33. On the contrary, they are inconsistent with that view.

The objection taken by counsel on behalf of the respondent to a finding that the instrument creates an easement appurtenant to land of which Smith was a joint owner is, of course, that no dominant tenement is specified in the instrument, and it is argued that no addition can properly be made to the contents of the instrument so as to include that essential of an easement, and, in any event, that the Court should not infer from the evidence that the land of which Smith was joint owner was intended by the parties to the instrument to be the dominant tenement. As stated above, there is no such thing as an easement in gross. Therefore, if the Court cannot properly infer from the evidence that the right of way, so called in the instrument, was intended by the parties to be appurtenant to the land adjacent to Lot 33 owned by Smith and his wife and subsequently divided into lots as shown on Plan 320, the plaintiff's claim that no easement for the benefit of those lands was created by the instrument must succeed. If, however, the Court can properly draw that inference and supply in the instrument dated 21st September 1925 the omission to specify the dominant tenement, all the essentials of a valid easement would be present and the Court should then hold that there was a valid grant by deed of a right of way over Lot 33, Plan 103, appurtenant to the adjacent land owned by Smith and his wife.

It is my opinion that when a dominant tenement has not been specified in an express grant, the Court can properly examine the circumstances existing at the time when the instrument was executed, and from the evidence make a finding as to whether or not the parties intended the right granted to be appurtenant to a dominant tenement, and, if so, to find what was the dominant tenement. The Court can admit and give

effect to evidence as to the circumstances existing at the time the instrument was made for the purpose of ascertaining the true nature of the transaction between the parties: see Phipson on Evidence, 8th ed. 1942, p. 569. Again, where there has been an omission apparent in the document itself, then the circumstances existing at the time when the instrument was executed may properly receive attention: Gale, *op cit.*, p. 72.

In *The Canada Cement Company v. Fitzgerald* (1916), 53 S.C.R. 263, 29 D.L.R. 703 (referred to by the learned Chief Justice of the High Court), the Supreme Court of Canada gave effect to a right of way reserved by the grantor, although the dominant tenement was not specified in the deed creating the right of way.

It then becomes a question as to whether the Court should draw the necessary inference from the evidence in this particular case. I state at once my view that the Court should do so. These are the circumstances which lead me to that conclusion: After Lot 33 was laid out on subdivision Plan 103, it was used as an appurtenance to the land then occupied and subsequently owned by Smith and his wife. It served those lands as a means of access to and from the Lake Shore Road. It was a direct route to and from that highway. It was likewise used in connection with those lands to go to and from Mahoney's side-road. Mrs. Bray, an adopted daughter of the late John T. Smith, was only three weeks old when she was taken to the farm in 1913. She lived there until 1942. She described a lane on the farm which opened through a gate on to Lot 33 and after crossing Lot 33 continued "to the Lake Shore Road". Speaking of the condition of the lane after crossing Lot 33, she said: "There was a track, but it was more of a road that is not used as much as an ordinary road would be." She said, in speaking of the use of the land: "We walked across it whenever we wanted to. If we had any occasion to drive over it we drove over it, and many a time I have watched cows over that lane." She remembered "our wagon going up there", and that her father would drive his wagon over it. Again referring to the lane at the farm she described it as leading "out to the roadway, crossing Lot 33 and Lot 17, down to the Lake Shore Road". Finally she testified: "From the time I started going in the lane we used to—we always went that way, nearly always went

that way.” Speaking of the use of Lot 33 as a means of access to Mahoney’s side-road, she said she had travelled on it for that purpose and “anyone who wanted to used it in that way”.

Another witness, Arthur King, knew the lane for 35 years and said: “It went from the Lake Shore Road up to the farm buildings. I think it was the original lane of the farm at one time.” It was used for the purpose of going from the farm buildings to the Lake Shore Road in connection with farm work and again he repeated: “Originally when it was a farm, it was originally a farm lane.”

I have no doubt from the evidence that Lot 33 was used in the manner described during the time when the adjoining farm land was first occupied by Smith and his wife as tenants of Sheppard and also after 1917, when Sheppard conveyed the lands to them as joint owners. The deed to them did not contain an express grant of a right of way over Lot 33 as an appurtenance to the farm lands, but in fact it was an appurtenance for the benefit of those lands. There is no evidence of any objection or interruption to the use of Lot 33 as an appurtenance to the adjoining lands owned by Smith and his wife, either before or after they became owners thereof. It was not until 1924, when part of the original lane (now Lot 17, Plan 103) leading from the Lake Shore Road to the west limit of Lot 33 was sold by Sheppard to one Lascelles, that Smith was in danger of interruption to his access from and to the Lake Shore Road. It was no doubt for the purpose of preserving and securing that access that he purchased the necessary land (Lot 17) from Lascelles. That lot was of little or no value except as a way to and from the Lake Shore Road. It may be fairly inferred also that after making that purchase from Lascelles he wished to ensure that he had title to a continuous way from his lands to the Lake Shore Road and for that purpose sought from Sheppard an express grant of a right of way over Lot 33. In my opinion that was the purpose to be accomplished by the instrument dated 21st September 1925. The position of the grantor, Sheppard, before and at that time is quite plain. After part of his farm land was divided into lots fronting on the Lake Shore Road in 1910 (by subdivision Plan 103) he would no doubt know that Lot 33 was being used by his tenants of the adjoining farm lands for the purpose of

access to and from the Lake Shore Road and to and from the Mahoney side-road. That use continued to his knowledge, no doubt, after he conveyed the farm lands to Smith and his wife. It can be fairly inferred that such use was regarded by him, as well as by Smith and his wife, as an appurtenance to the farm lands even though no express grant of such a right was included in the deed. Therefore, when Smith sought to complete his title to the right of way which he had in fact enjoyed as an appurtenance to the lands owned by him and his wife, there would be willingness on the part of Sheppard to give the deed dated 21st September 1925. I am quite satisfied that both Sheppard and Smith intended that the right of way given by that instrument should be, as it had been theretofore, an appurtenance to the land owned by Smith and his wife.

The objection that the grant of the right of way is contained in a conveyance separate and apart from the conveyance of the dominant tenement is not good in law. A grant of an easement *per se* is unusual and indeed there are few reported cases of that kind. The best and proper practice is to define carefully in the instrument creating the right of way not only the nature and extent of the right, but also the dominant tenement to which it is intended to be appurtenant. Notwithstanding that the grant of the right of way in this case is made by deed separate from the conveyance of the dominant tenement, I hold that it created a good and valid easement.

I cannot concur in the finding made by the learned Chief Justice of the High Court that the right of way in question was "a very limited one". It must be remembered that the extent of the right of way in question depends upon the language in an express grant. It is not a right of way acquired by user and it must be distinguished therefrom. The language of the instrument creating the grant contains no words of limitation as to either the nature or the extent of the right of way. On the contrary, the right of way is plainly unlimited both in nature and in extent. The language of the instrument is plain and free from ambiguity.

I have given much consideration to the question whether in a case where the omission to specify the dominant tenement in an express grant of a right of way is supplied by an inference from the evidence of the circumstances existing at the time of

the grant it is essential at the same time to limit the nature and extent of the right of way as disclosed by the extrinsic evidence. I have been unable to find any case in which that question has been decided, and, therefore, I express my view without any authority in support of it. It is my opinion that the extrinsic evidence is admissible and can be used for the sole purpose of supplying the omission in the instrument containing the grant, but when the evidence has been admitted for that purpose the Court is not compelled to use it for the purpose of limiting the right granted by the instrument when the language therein is free from all ambiguity and no limitation can properly be found from it. If there had been no omission in the instrument, extrinsic evidence would not have been admissible for the purpose of varying the terms thereof, and it is my view that when the omission is supplied in a proper case by the use of extrinsic evidence, the same rule is applicable. Therefore, in my opinion the plain language in the instrument dated 21st September 1925, must be given full effect and it should be held that the right of way thereby created is unlimited.

It remains only for me to say that the authorities to which I have previously referred show that the right of way appurtenant to the lands owned by Smith and his wife at the time of the grant attached to each of the severed portions thereof after the land was subdivided into lots. The right of way as originally created has not been abandoned or extinguished as contended by counsel for the respondent, but, on the contrary, continues for the full benefit and unlimited use as an appurtenance of each of the lots forming part of the original dominant tenement to which the right of way was appurtenant.

I would allow the appeal with costs. The appeal is brought by the defendant Perry Winch alone, and the action as against him should be dismissed with costs. The judgment of the Court below should be varied accordingly.

GIBSON J.A. agrees with LAIDLAW J.A.

Appeal allowed with costs,

ROBERTSON C.J.O. *dissenting in part.*

Solicitors for the plaintiff, respondent: Hollinrake & Bartrem, Toronto.

Solicitors for the defendant Winch, appellant: Mathews, Stiver, Lyons & Vale, Toronto.

[McRUER C.J.H.C.]

General Dry Batteries of Canada Limited v. Brigenshaw et al.

Labour Law — Rights of Employers and Employees respectively — Peaceful Picketing — Immateriality of Legality or Illegality of Strike — Acts Going beyond Peaceful Picketing — Interference with Property-rights of Employer — Restraining by Injunction — Terms of Injunction.

"Peaceful picketing", in the sense recognized as lawful in *Robinson v. Adams* (1924), 56 O.L.R. 217, and *Rex v. Baldassari*, [1931] O.R. 169, is not rendered unlawful, and subject to restraint by injunction, by the fact that the strike in connection with which the picketing is done is unlawful. Even if the employees have broken a collective bargaining agreement, they still have a right at common law to inform others peacefully that they are on strike.

Employees are not entitled, however, whether the strike is legal or illegal, in the guise of advancing their interest in a labour dispute, to go beyond peaceful picketing and interfere with their employer's property or business interests (e.g., by attempting to prevent other employees, who wish to work, from entering the employer's premises, or by bringing external pressure to bear on other persons to prevent them from doing business with the employer), and such excesses will be restrained by injunction. It cannot be argued that if the employees' acts amount to breaches of s. 501 of The Criminal Code the jurisdiction of the Court to grant an injunction is destroyed. *Oakville Wood Specialties Limited v. Mustin et al.*, [1950] O.W.N. 735; *Belleville Lock Co. Ltd. v. Tyner et al.*, [1950] O.W.N. 793, considered. Although labour problems should, as far as possible, be dealt with by the special tribunal set up for that purpose under The Labour Relations Act, the jurisdiction of the Courts in such matters is not entirely ousted, and they stand ready to protect the rights of both employers and employees in a proper case.

A MOTION for an interlocutory injunction. The action was for an injunction only.

23rd May 1951. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

G. D. Watson, K.C., for the plaintiff, applicant.

C. L. Dubin, K.C., for the defendants, *contra*.

23rd May 1951. McRUER C.J.H.C. (orally):—In this action the plaintiff moves for an interlocutory injunction in wide terms, to restrain the defendants from picketing or attempting to picket the plaintiff's business premises, improperly interfering with the plaintiff's business by intimidating employees, and other unlawful acts.

Four defendants have not been served with the notice of motion and as to them I make no order. These defendants are E. Brigenshaw, D. Shortt, J. Hachey and K. Murphy.

On the 12th June 1950 a collective bargaining agreement was entered into between the plaintiff and Local 512 of The United Electrical, Radio and Machine Workers of America, which is

admitted to be the bargaining agent under The Labour Relations Act, R.S.O. 1950, c. 194, for the employees of the plaintiff. This agreement is stated to be effective from the 1st June 1950 to the 1st June 1951, and from year to year thereafter unless reopened by either party by notice of desire to change or amend it, submitted in writing to the other party at least 30 days, and not more than 60 days, prior to the expiration date or any anniversary of the expiration date. The agreement goes on to provide that within 15 days after receipt of such notice the parties shall arrange for conferences to negotiate the desired changes, and should such negotiations fail to result in agreement, the contract shall be deemed to have terminated on the expiration date or anniversary date unless by mutual agreement in writing the contract is continued in force for an additional period of time to permit further negotiations. If neither party requests changes in the contract at least 30 days in advance of its expiration date, it shall be deemed to be in full force and effect for another year.

Article II provides in part: "The Union agrees that during the life of this Agreement there will be no strikes, stoppages or slowdowns of work or other collective actions which will stop or interfere with production, and the Company agrees that it will not cause or direct any lockout of employees."

The plaintiff is engaged in the manufacture of dry battery cells at 228 St. Helens Avenue in the city of Toronto. According to the affidavit of Mr. Brands, the works manager of the plaintiff, on the 22nd February 1951 representatives of the union applied to the manager of the plaintiff to negotiate amendments to the wage provisions of the collective agreement. During the week of 5th March the management offered to negotiate all phases of the contract, including wages, and proposed changes were submitted by the union under date of the 20th March 1951. Negotiations took place at ten meetings from the 21st March to the 24th April, at which time union representatives broke off negotiations. Mr. Brands states that for over a week prior to the 24th April there was evidence of a deliberate slowdown in plant production ranging from 9.1 per cent to 52 per cent. in various departments, and on the 24th April at 1 p.m. the employees of the plaintiff left the plant without warning and have not returned to work since.

On the 3rd May at 1.30 p.m. employees of the plaintiff and others commenced to picket the plaintiff's plant carrying sandwich boards on which it was stated "General Dry Workers on Strike". It is stated by Mr. Brands that on the 3rd May two delivery-trucks attempting to make deliveries to the plaintiff's plant were turned away by the defendant Boratto, and on the same afternoon members of the supervisory staff were loading a railway car on a siding rented by the plaintiff and pickets appeared on the railway property adjoining the siding and pickets were maintained on regular shifts and that shifts of pickets were maintained in that vicinity which prevented the moving of a freight-car. Mr. Brands goes on to state that on the 4th May arrangements were made with railway officials for moving the railway car, but approximately 25 to 35 pickets, led by the defendant Brigenshaw, refused to permit the moving of the railway car in question. On the railway car were loaded 70,000 pounds of finished batteries made to specifications for several important customers of the plaintiff who needed them badly, and up until the present time the plaintiff has been unable to ship this carload of batteries.

Apparently there have been communications with the plaintiff's customers, some of them at any rate, advising them that the employees are out on strike. On the morning of the 4th May approximately 65 people, mainly employees of the plaintiff, were marching back and forth in front of the plaintiff's plant on St. Helens Avenue. They occupied the whole sidewalk, and it was almost impossible to obtain access to the plaintiff's premises. The mass picket-line dispersed at 8.45 a.m. and six rotating picket-lines were maintained for the rest of the day. On the same date a truck-load of finished goods was prevented from leaving the plant by a number of pickets milling about the exit and two employees, A. Labarge and A. Backus, used their motor cars to barricade the exit. With police assistance, the truck finally left the plant and was then closely followed by a car driven by Murphy. The truck returned to the plaintiff's plant without having made the delivery for fear that pickets would embarrass the plaintiff's customer. On the afternoon of the 4th May members of the supervisory staff were warned by the defendant Shortt and others that they would not be permitted to enter the plant on Monday, the 7th May.

On the morning of the 7th May there were approximately 50 to 60 employees picketing the premises in question, and four members of the supervisory staff were prevented from entering by the defendant Hobbs and others, and the supervisors were finally able to effect an entrance through a side door, but they were subjected to verbal threats on the part of the picketing employees. On the 8th May the plaintiff's premises were picketed by 60 persons. Several of the supervisory staff were unable to enter the plaintiff's premises except with police assistance and after being subjected to verbal abuse and threats by the pickets. One of the supervisors was physically assaulted by the defendant Hobbs and one member of the supervisory staff was assaulted by the defendant Shasko and told to keep out of the plant.

On the morning of the 9th May mass picketing of the plaintiff's plant was continued and members of the supervisory staff were only able to effect entrance to the plaintiff's premises with police assistance and were subjected to verbal abuse, threats, and in some cases physical violence. One member of the staff, Mrs. Zimmerman, had a needle driven into her shoulder by one of the pickets. The needle was removed by a police officer. Two other members of the supervisory staff were pelted with rotten eggs. One other member of the supervisory staff was physically assaulted by the defendant Izotti.

Mr. Brands states that there is on the plaintiff's siding a railway car containing raw materials for use in the plaintiff's plant, that it has not been possible, because of the picketing, to obtain labour to unload the car, and that consequently the plaintiff has incurred, and will continue to incur, demurrage charges until the car is unloaded. There is another car of raw materials waiting to be placed on the plaintiff's siding and unloaded, on which the plaintiff will also be required to pay demurrage charges. There has also been loss by reason of partly-processed batteries becoming worthless.

The plaintiff has made an application to the Ontario Labour Relations Board under s. 59 of the Act for a declaration that the strike is unlawful, and it is stated that it will be probably a month before this application can be dealt with.

There are two or three main points argued in this case which are really important.

In the first place, it is argued by Mr. Watson that as long as a collective bargaining agreement is in effect any strike that takes place is unlawful and all picketing of any sort that may be done while the strike is on is likewise unlawful and may be restrained, and for this argument he relies on the judgment of my learned brother Gale in *Oakville Wood Specialities Limited v. Mustin et al.*, [1950] O.W.N. 735. It is always unfortunate when either employers or employees have to resort to the Courts with reference to the solution of labour problems. A forum has been provided under The Labour Relations Act to deal with labour relations, and my own personal view is that, as far as possible, these problems should be solved by those who are particularly skilled in the adjustment of labour matters. However, the Courts are always here to protect personal and property rights; on the one hand, the right of the employer to exercise his common law rights over his own property without unlawful interference by anyone, and, on the other hand, the right of every individual, be he a member of a labour union or not, to exercise those personal rights that are given to him by the common law. When parties come to the Court for a solution of a difficulty that arises with respect to the exercise of any of these rights, it is the duty of the Court to respect and enforce them unless the jurisdiction of the Court has been taken away by statute.

In this case it is necessary for me to draw the line between what is lawful and what is unlawful. Unless I can find in The Labour Relations Act or in the collective bargaining agreement that has been entered into, something that will show that what is called "peaceful picketing", that is, lawful picketing, is made a thing that can be restrained by injunction because there has been a breach of a collective bargaining agreement, I cannot see that I can give any injunction restraining that sort of picketing. In *Rex v. Baldassari et al.*, [1931] O.R. 169 at 172, 55 C.C.C. 318, Rose C.J.H.C., applying the principles expressed in the judgment of Middleton J.A. in *Robinson v. Adams*, 56 O.L.R. 217, [1925] 1 D.L.R. 359, held that mere picketing was not unlawful nor did it amount to a common law nuisance. It may be very true that the employees have improperly broken their agreement and it may be that it is unlawful for them to break their agreement, but I think they nevertheless have a

common law right to inform others peacefully that they are on strike, be the strike lawful or unlawful, and if they choose to exercise this right by picketing in a manner that is not otherwise unlawful their actions cannot be restrained by, and particularly by, an interlocutory injunction. On that point I am not in agreement with Mr. Watson in the wide interpretation that he seeks to place on Mr. Justice Gale's judgment. It is for the legislature and not for the Courts to make picketing, not amounting to a nuisance at common law or the publication of defamatory matter, something that may be restrained by injunction.

Mr. Dubin argues that in no case could I consider whether the strike is lawful or unlawful because under s. 68 of The Labour Relations Act an exclusive jurisdiction is conferred on the Ontario Labour Relations Board to determine whether the strike is an unlawful one. I am not prepared to accept that argument for all purposes. There are certain powers conferred on the Board and in the exercise of its powers the Board has certain exclusive jurisdiction, but I do not think that the provisions of the Act are so wide as to prevent the Courts from dealing with the subject of whether a strike is or is not lawful, if in a proper case that should be necessary. But in the view that I take of this case I do not think the fact that the strike may be an unlawful one advances the plaintiff's case.

But Mr. Dubin goes further and argues that if the employees, in the exercise of their common law right to picket, that is, to picket peacefully, should go further and commit unlawful acts that are a criminal offence under either s. 501 of The Criminal Code, R.S.C. 1927, c. 36, as amended by 1934, c. 47, s. 12, or any other law, then the Court has no jurisdiction to deal with those unlawful acts as they are public and not private wrongs and the private remedy of injunction is no longer open to any plaintiff. To reduce this argument to first principles, it means this—that a man who interferes with the business of another is subject to restraint by injunction as long as he keeps himself without the criminal law, but if what he does is a criminal offence then, whether he be prosecuted or not, a party injured by his acts has no right to relief in a Court of equity. I think the statement of that proposition is sufficient to indicate not only that it is unsound but that it would be extremely unjust that the Courts of equity should be limited in giving relief

simply because a defendant may say: "Well, what I did and what I am doing is a criminal offence and the only relief you may have is to prosecute me." I know that there is a certain body of law that deals with the question whether the creation of a criminal offence is intended to create a private right, but that has nothing to do with the principle with which I am dealing.

So, in dealing with those acts outlined in Mr. Brands's affidavit that go beyond peaceful picketing and interfere with the business of the plaintiff, I have no hesitation in holding that a Court of equity has power to restrain any repetition of acts of that character which are obviously an interference with the freedom of the owner of the property to exercise his common law rights over the property that he owns. Mr. Dubin does not purport to defend the excesses that were related in Mr. Brands's affidavit but he says that the Court ought not to grant an injunction because, since the 9th May, there has been no repetition of these acts and the writ in this matter was issued on the 10th May. There is evidence that satisfies me that the plaintiff has a right to be apprehensive that there will be further interferences with the exercise of its property rights unless an injunction is granted.

I am not at all convinced that, in what one may call the guise of advancing their interest in a labour dispute, employees are entitled to bring external pressure to bear on others who are doing business with a particular person for the purpose of injuring the business of their employer so that he may capitulate in the dispute. It is one thing to exercise all the lawful rights to strike and the lawful rights to picket; that is a freedom that should be preserved and its preservation has advanced the interests of the labouring man and the community as a whole to an untold degree over the last half-century. But it is another thing to recognize a conspiracy to injure so that benefits to any particular person or class may be realized. Further, if what any person or group of persons does amounts to a common law nuisance to another what is being done may be restrained by injunction.

I recognize and emphasize that the power to grant an interlocutory injunction is one that should be exercised with great care and restraint in all cases and particularly in labour disputes. However, in view of the excesses resorted to an in-

junction should go that will keep this dispute within proper legal limits. Excesses are always unfortunate because after all the weight of public opinion helps much in working out such useful legislation as we have in the labour legislation in force today.

Instead of granting an injunction as asked by Mr. Watson in the broad terms granted in *Oakville Wood Specialties Limited v. Mustin et al.*, *supra*, where my learned brother Gale was dealing with a case of mass picketing such as has been discontinued in this case, I will grant an injunction in the more restricted terms prescribed by my learned brother Smily in *Belleville Lock Co. Ltd. v. Tyner et al.*, [1950] O.W.N. 793, but in so doing I do not wish it to be implied that where there is such an interference with the rights of an employer as Mr. Justice Gale was dealing with an injunction in the wider terms is not a proper remedy if the circumstances make it necessary.

An order will go that the defendants, except those that I have named who have not been served, will be restrained (a) from improperly interfering with the employees of the plaintiff by preventing or attempting to prevent by the use of force, threats, intimidation, or coercion the said employees from entering or leaving the plaintiff's premises at 228 St. Helens Avenue, in the city of Toronto; (b) from intimidating or threatening harm to or in any way interfering with the servants, agents, employees, suppliers, patrons or customers of the plaintiff or any other person seeking peaceful entrance to or exit from the said place of business of the plaintiff; (c) from inducing or attempting to induce breaches of contract between the plaintiff and other persons or corporations; and (d) from ordering, aiding, abetting, counselling, procuring or encouraging in any manner whatsoever, whether directly or indirectly, any other person or persons to commit the aforesaid acts.

The costs of the motion will be costs in the cause.

Order accordingly.

Solicitors for the plaintiff: Smith, Rae, Greer, Sedgwick, Watson & Thom, Toronto.

Solicitors for the defendants: Kimber & Dubin, Toronto.

[COURT OF APPEAL.]

National Trust Company Limited v. Barcelona Traction, Light & Power Company Limited; Ex parte Westminster Bank Limited.

Receivers — Powers and Duties of Receiver and Manager — Term of Appointment — Proceedings by Trustee for Bondholders to Protect its Security — Intervention by Receiver — Absence of Interest — Exchange of Interim Bond Certificates for Definitive Bonds.

Bonds and Debentures — Interim and Definitive Bonds — Trustee for Bondholders Holding as Security Interim Certificates of Prior Bond-issue — Right to Definitive Bonds.

A company issued three series of bonds, the security for series 3 bonds being £2,640,000 principal amount of series 2 bonds, which were specifically charged "by way of first, fixed and specific charge" for this purpose. The affairs of the company became unsettled, and there was very evident danger of heavy loss to some of the bondholders and to the company itself, through no fault of any of the parties before the Court. The trustee for bondholders of the first and second series brought an action against the company for the realization of its security, and a receiver and manager was appointed. The trustee for the holders of series 3 bonds, which held only interim certificates, purporting on their face to be exchangeable for definitive bonds on the demand of the holder, thereupon made demand for an exchange in accordance with the term of the certificates. This was refused, and the trustee then moved in the action for an order directing the exchange.

Held, the trustee was entitled to the relief claimed. It was not disputed that it had a valid first charge on the bonds, and it was the holder of interim certificates which the company had agreed to exchange for definitive bonds. The bonds could not be issued to any other person, and were not available to the company or to the receiver and manager to issue in any other way. The receiver and manager, appointed in the action of the trustee for other bondholders, had no interest in these bonds, and neither he nor the company had any right to divert anything from the amount of bonds the trustee was entitled to receive in exchange for interim certificates, and to hold as provided in the trust deed. *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160; *Watson v. Imperial Steel Corporation Ltd.* (1925), 29 O.W.N. 81, applied. The trustee had a clear right as against the company to the exchange asked for, and the receiver and manager had no status to interfere.

It is not good practice to appoint a receiver and manager in such an action without any time-limit, or for the receiver and manager, when appointed, to remain in office for several years without the plaintiff taking any steps towards a sale, or towards bringing the action to trial: *In re Newdigate Colliery Limited; Newdegate v. The Company*, [1912] 1 Ch. 468 at 472.

Order of SCHROEDER J., [1950] O.R. 864, affirmed with a variation.

AN APPEAL by the defendant from the order of Schroeder J., [1950] O.R. 864, [1951] 1 D.L.R. 537.

9th to 12th April 1951. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW, ROACH, HOGG and GIBSON J.J.A.

J. J. Robinette, K.C., for the respondent: I have a preliminary objection. The defendant company, by reason of the appointment of a receiver and manager, is incompetent to appoint solicitors or counsel, or to prosecute this appeal. The

effect of the appointment of a receiver and manager in a bondholders' action is to take away all powers from the company or its directors, and to vest those powers in the receiver and manager.

The appointment of a receiver and manager has significance in four respects: (1) It does not destroy the corporate existence of the company. (2) It is not the same as or equivalent to an order in bankruptcy or for winding-up, but the assets are vested in the receiver. (3) It prevents the use of assets or income for any purpose other than the protection of the rights of the secured creditors. (4) The receiver displaces the board of directors in the control of the assets and affairs of the company. [ROBERTSON C.J.O.: This proceeding affects the liability of the company?] Yes. If the receiver feels that the proceedings should be defended, or that an appeal should be taken, he may act in the name of the company. All powers of the company are vested in him. [ROBERTSON C.J.O.: It seems extraordinary that there should be no decided cases on this point. Where does the Court get authority to appoint a receiver?] It is my understanding that a Court of equity has inherent jurisdiction to appoint a receiver and manager for the protection of bondholders. [ROBERTSON C.J.O.: But the board of directors does not cease to exist?] No, the board remains in office, but it has no power over the affairs of the company. [ROBERTSON C.J.O.: Could the receiver and manager pass a by-law?] No, I do not think so; however, neither could the directors do so while the receiver remained in control.

[ROBERTSON C.J.O.: The motion as originally made by Westminster Bank Limited was for leave to sue an officer of the Court for certain relief, but by consent of counsel the motion was changed to one for a decision as to the rights of the parties. Can that be done?] I submit so, under the authority of *In re Savoy Estate Ltd.*; *Remnant v. The Company*, [1949] Ch. 622, [1949] 2 All E.R. 286, and *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476, C.R. [1913] A.C. 259. The bank asked for leave to bring an action or to make a motion in the pending action for the same relief. The leave of the Court must be obtained in either case.

[LAIDLAW J.A.: Could the receiver, expressly or impliedly, authorize the board of directors to take proceedings?] All that

the receiver can do is to act as the board would act, and to take proceedings himself in the name of the company; there should be only one set of solicitors and counsel. [ROBERTSON C.J.O.: The notice of motion was served on the company; does that not entitle it to appeal?] We were unduly cautious. We wanted to serve everybody, but probably should have served only the company, whereupon the receiver would have had to decide whether or not to defend. Ordinarily, as a general rule, a company can instruct solicitors through its board of directors. Where a receiver is appointed, he takes the place of the board: *Daimler Company, Limited v. Continental Tyre and Rubber Company (Great Britain), Limited*, [1916] 2 A.C. 307 at 336-7.

A. S. Pattillo, K.C. (A. J. MacIntosh, with him), for the defendant, appellant: The company is a necessary and proper party in a receivership action, and in all proceedings in the action. There is nothing in the order appointing the receiver that suspends the rights of the board of directors. [LAIDLAW J.A.: The order says that the receiver is to defend all actions; what about this action?] The order refers only to actions other than the receivership action: *In re Newdigate Colliery, Limited; Newdegate v. The Company*, [1912] 1 Ch. 468; *In re Thames Ironworks, Shipbuilding and Engineering Company, Limited; Farrer v. The Company*, [1912] W.N. 66; *In re Great Cobar, Limited; Beeson v. The Company*, [1915] 1 Ch. 682; *Montreal Trust Company v. Abitibi Power and Paper Company, Limited*, [1943] A.C. 536, [1943] 2 All E.R. 311, [1943] 3 W.W.R. 33, 25 C.B.R. 6.

[THE COURT reserved judgment as to the preliminary objection, and directed counsel to proceed with argument on the merits of the appeal.]

I should like to review the events in Spain that led up to the bankruptcy order there. [ROBERTSON C.J.O.: Why are we concerned with matters in Spain? That is merely hearsay, and might prejudice the Court. It would be very dangerous to listen to an account of the conduct of someone who is not before the Court.] The Court should have before it any facts that show a likelihood of detriment to result from the making of the order sought. Any sale of bonds by the bank might prejudice our attempt to set aside the Spanish bankruptcy proceedings.

The judge of first instance should first determine, without regard to the position of the bank, whether the contract is one that he should direct the receiver and manager to perform. He should consider only the interests of those entitled to share in the assets, and in making this decision he should pay no attention to the contractual rights of the parties. It is strictly a business decision, as to whether or not it is in the interest of those entitled to share in the estate that the contract in question be performed by the receiver and manager. In determining whether or not a receiver and manager should perform a contract entered into by the company before the receivership the Court should be guided by the following rules: (1) If the contract is detrimental to the security-holders, and non-performance will in no way damage the goodwill of the company, the Court will not direct that it be performed. (2) If non-performance of the contract would damage the goodwill of the company, and the equity of redemption is of value to the shareholders and general creditors, then the Court may direct that it be performed. (3) It requires very strong evidence of damage to the goodwill of the company before the Court will require a contract to be performed if this will necessitate the borrowing of money, the lender of which would rank ahead of the security-holders: *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476, C.R. [1913] A.C. 259; *Moss Steamship Company, Limited v. Whinney* [1912] A.C. 254; *Meigh v. Wickenden*, [1942] 2 K.B. 160, [1942] 2 All E.R. 68; *In re Newdigate Colliery, Limited*; *Newdegate v. The Company*, [1912] 1 Ch. 468; *In re Thames Ironworks, Shipbuilding and Engineering Company, Limited*; *Farrer v. The Company*, [1912] W.N. 66; *In re Great Cobar, Limited*; *Beeson v. The Company*, [1915] 1 Ch. 682.

[ROBERTSON C.J.O.: Could the Court say to Westminster Bank Limited that it could not enforce its security because it would hurt someone else?] The bank has its security now; it has interim certificates which, under the trust deeds, are quite as effective as the definitive bonds it seeks. We could not stop the sale of these interim certificates.

The learned judge below erred (a) in not deciding that an order for the delivery of definitive bonds would be detrimental to the estate in the hands of the receiver and manager, (b) in deciding that the bank was seeking only to perfect a security

pledged with it, and (c) in holding that there was a duty on the receiver and manager to perform the company's contract to give definitive bonds in exchange for the interim certificates. The receiver and manager owes no duty except to persons entitled to share in the estate in its hands: *Parsons et al. v. The Sovereign Bank of Canada, supra*.

Assuming that there was a contractual obligation on the company to deliver definitives to the bank, this contractual obligation should not be performed by the receiver and manager because performance will be detrimental to the interests of those entitled to share in the estate. If the bonds are sold by the bank the claims of the security-holders entitled to share in the estate in the receiver's hands will be increased by the difference between, on the one hand, the value of the pledged first mortgage bonds and the coupons attached and, on the other hand, the face value of the peseta bonds and interest coupons consequently present holders of first mortgage bonds, other than the bank, will be damnified. Further, if these bonds are sold, the peseta indebtedness may be satisfied, but a sterling indebtedness will be created in its place. The company has ample funds available in pesetas, but no sterling funds.

Any right the bank may have had against the receiver and manager, or against the company, is now barred by the Statute of Limitations. Time begins to run after a reasonable lapse of time from the date when the bank first received interim certificates, or, at the latest, from the date when it elected to hold interim certificates under the new trust deed of 15th May 1927. This defence should not have been rejected on the ground that to give effect to it "would be to permit the company to take advantage of its own wrong or default": *Butterfield et ux. v. Mabel et al.* (1873), 22 U.C.C.P. 230. The principle that equity looks upon that as done which ought to be done cannot be so applied as to defeat the provisions of the Statute of Limitations by considering a legal obligation as performed when in fact there was a breach of that obligation more than 20 years before the bringing of the action: 13 Halsbury, 2nd ed. 1934, p. 89.

C. F. H. Carson, K.C. (J. G. Middleton, K.C., with him), for the plaintiff and for the receiver and manager: The receiver and manager is not an agent for anyone, but is simply an officer of the Court. By virtue of his position he should bring to the

attention of the Court any relevant circumstances. When a receiver and manager is appointed he frequently finds outstanding contracts, and he must decide what to do with them. He goes to the Court for directions. The Court never cancels a contract, but it does determine whether or not any particular contract should then be performed. If it is not ordered to be performed, then the other contracting party can claim for damages and rank as an unsecured creditor. [ROBERTSON C.J.O.: Under cover of a writ and nothing more (since they have not yet disclosed their cause of action) the bondholders put in a receiver and manager with enormous powers, and then did nothing further. Something should be said about this astounding practice before it is too late.] Nothing is concealed. These proceedings are of the same nature as those in *Montreal Trust Company v. Abitibi Power and Paper Company, Limited*, [1943] A.C. 536, [1943] 2 All E.R. 311, [1943] 3 W.W.R. 33, 25 C.B.R. 6. [ROBERTSON C.J.O.: That case went a long way towards establishing a bad practice.] This procedure has been followed in England for many years. [ROBERTSON C.J.O.: This action might continue for ever. Why should the action not go to trial? The company is content that a receiver be appointed, and does nothing at all. There is nothing to countenance the starting of an action without going on to terminate it. It is a dangerous practice that is capable of being abused.] The receiver is not supporting this appeal, but is only endeavouring to put the facts before the Court.

When a receiver and manager has been appointed in an action to enforce the security of a bond mortgage, the Court determines, after considering the interests of the mortgagee and the mortgagor, whether or not a particular pre-receivership contract should be carried out. Where the interests of the parties are in conflict the Court looks at the matter from the business point of view and determines which of the conflicting claims shall prevail: Kerr on Receivers, 11th ed. 1946, pp. 260-2; Buckley on The Companies Act, 12th ed. 1949, p. 245; *In re Newdigate Colliery Limited*; *Newdegate v. The Company*, [1912] 1 Ch. 468; *In re Thames Ironworks, Shipbuilding and Engineering Company, Limited*; *Farrer v. The Company*, [1912] W.N. 66; *In re Great Cobar, Limited*; *Beeson v. The Company*, [1915] 1 Ch. 682; *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476, C.R. [1913] A.C. 259.

If the issuance of definitive bonds will facilitate a sale by the bank, and if such a sale is effected, a purchaser from the bank in the existing circumstances will rank against the assets for an amount far greater than he will pay for the bonds. Moreover the sterling indebtedness (as opposed to the peseta indebtedness) of the defendant will be increased and this, since the earnings of the subsidiaries are in pesetas, will increase the difficulty of effecting a reorganization.

There is no suggestion that a failure to proceed to issue definitives will adversely affect the goodwill of the company. [LAIDLAW J.A.: One is impressed by the memorandum of fact and law filed on behalf of the receiver and manager, which indicates that he has done everything possible to defeat the bank's claim. It appears clearer and clearer that the company and the receiver are at one.] The receiver and manager is trying to preserve a balance. I am not arguing any defences, but simply laying them before the Court for consideration. [GIBSON J.A.: In your neutral position can you show that if definitives were issued a sale would be easier than a sale of interim certificates?] No. [GIBSON J.A.: Then why should we be asked to prevent their issue?] If the interims are as saleable, it is difficult to understand why the bank should be trying so hard to obtain definitives. I suggest that the bank should give some evidence as to why it desires the definitives. [GIBSON J.A.: The bank is legally entitled to them. Should not the receiver be required to give some definite evidence to show why it should not get them?] All I can say is what might happen; I cannot say that it will certainly have that effect. [HOGG J.A.: It is difficult to decide on speculation as to what might happen.]

The real question before the Court is whether it is in the interest of the three classes of bondholders and of the company that the pre-receivership contract in question should be carried out. The bank's claim for definitive bonds does not involve the perfecting of its security. It now, by virtue of its interim certificates, enjoys all the security of a first mortgage bondholder. The issue of definitive bonds would not improve or perfect its security, or change its position in any way. This fact distinguishes this case from *In re Thames Ironworks, Shipbuilding and Engineering Company, Limited*; *Farrer v. The Company, supra*; *In re Newdigate Colliery, Limited*; *Newdegate v. The*

Company, supra; and *In re Great Cobar, Limited*; *Beeson v. The Company, supra*.

The preliminary objection should not be sustained. The argument must mean that the board of directors has become impotent, which is not correct: *Watson v. Imperial Steel Corporation Ltd.* (1925), 29 O.W.N. 81.

J. L. Stewart, K.C., for the plaintiff and for the receiver and manager: The plaintiff finds it impossible to reach a definite conclusion as to whether the issue of definitive bonds, as ordered by the learned judge below, will eventually prove to be prejudicial to the interest of the bondholders it represents. It considers, however, that it is clearly possible that those interests will be seriously affected. If the affairs of the company were settled, the next step might be a reorganization, and the bondholders might be paid off in full. In that case definitives would be no better for the bank than interim certificates. [ROBERTSON C.J.O.: It is more likely that the result will be the opposite. The bank is justified in thinking that it had better get out.]

As to the preliminary objection, the defendant is a mortgagor, and as such has a right to express its view as to what the Court is to do with its assets. It is entirely proper for the company to appear in these proceedings.

J. J. Robinette, K.C. (*R. J. Dunn*, with him), for Westminster Bank Limited, respondent: I adopt what the trial judge said as to the argument of limitation. Under the peseta bond mortgage we had a continuing right either to hold the interim certificates during the term of the mortgage (45 years from 1927) or to exchange them for definitives. If one had an option to purchase land for a 45-year period it could not be defeated during that time by the Statute of Limitations. The limitation period did not begin to run until the interim certificates were presented and delivery of definitives was refused, which happened in 1949. The time cannot begin to run until after the happening of all events that the plaintiff or applicant must prove as part of his case. The authorities are clear that if there is a promise to do anything upon request, other than the payment of a present debt, time runs only from the date of the request. In the present case we had no cause of action until after we had actually tendered the interim certificates: 20 Halsbury, 2nd ed. 1936, ss. 759-60, pp. 604-5; *Webb v. Martin* (1661), 1 Lev. 48,

83 E.R. 291; *Shutford and Borough's Case* (1628), Godb. 437, 78 E.R. 257; *Bradford Old Bank, Limited v. Sutcliffe*, [1918] 2 K.B. 833 at 848; *Lewington et al. v. Raycroft*, [1935] O.R. 440, affirmed [1935] O.R. 474, [1935] 4 D.L.R. 378.

It has been argued that the company committed a breach of its agreement within a reasonable time after 1927, because definitives were not placed in the hands of the trust company. One cannot tell when the trust company ceased to have enough definitive bonds to cover our interim certificates. Even to-day the company has some definitive bonds in its hands. Even if it lies in the company's mouth to rely on this argument (which I submit it does not), the evidence does not establish it.

Considerations of harm or benefit are immaterial when the Court is dealing with an executed contract. We fulfilled our obligation years ago by advancing the money: *In re Newdigate Colliery, Limited; Newdegate v. The Company*, [1912] 1 Ch. 468; *Pegge v. Neath and District Tramways Company, Limited*, [1898] 1 Ch. 183. We owe a duty to our own peseta bondholders and must do everything to obtain what we are entitled to. We have a legal right to the definitives, and are not required to tell why we want them, or to make excuses.

We are under no onus to show that there will be no detriment if definitives are issued. There can be no such onus where a party is asserting a legal right. It is like asking the plaintiff in an action for debt how he will spend the money if he succeeds.

We have also served notice of a motion to vary the order below in respect of the terms imposed upon us. We should not be required to give security for the cost of printing or lithographing the definitive bonds, and should not be required to furnish indemnity for English stamp tax; there is no evidence that any stamp tax will be payable.

I do not press the appeal as to interest, but concede that the judge below was right in this respect.

We also appeal the learned judge's disposition of costs. We were allowed no costs, but it was ordered that the costs of the company and of the receiver and manager should be paid on a solicitor and client basis. [ROACH J.A.: What right have you to appeal as to costs?] If the Court varies the order in any way I am entitled to ask that it be varied in respect of costs. It is only where the appeal is as to costs only that leave is required.

We succeeded as to about 90 per cent. of what we asked for, but were given no costs, while everyone who opposed us was given costs out of the fund. The fund from which the costs will be paid will be raised by the sale of receiver's certificates, and this fund should be to protect the interests of secured creditors of the company, but the company is given its costs out of it. I submit that we are entitled to costs against everyone: *Re Hammond*, [1935] O.W.N. 1 at 7, [1935] 1 D.L.R. 263, affirmed [1935] S.C.R. 550, [1935] 4 D.L.R. 209.

A. S. Pattillo, K.C., in reply: There is no distinction between this case and *In re Thames Ironworks, Shipbuilding and Engineering Company, Limited; Farrer v. The Company*, [1912] W.N. 66. The contract there was quite as much executed as it is in this case.

The bank is really seeking to sell outside of the receivership. [ROACH J.A.: Why should it be obstructed in doing that?] Because there would be a good chance, if it did so, that the Spanish situation would never be cleared up. The bank says that it is trying to perfect the security it has, but it is really seeking a different document. It now has everything, so far as protection goes.

No burden resulting from the performance of this contract should be imposed on the receiver and manager that would ultimately rank ahead of the prior lien bonds and first mortgage bonds.

If costs are to be awarded in favour of the bank they should be awarded against the company; to award them against the receiver and manager, to be paid out of the estate, would prejudice the position of the prior bondholders. If they are awarded against the company they will come into the receivership. We brought the appeal. If it fails we are responsible and costs should be awarded against us.

C. F. H. Carson, K.C., in reply.

J. J. Robinette, K.C. in reply as to the cross-appeal.

Cur. adv. vult.

8th June 1951. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the defendant in the action from the judgment of Mr. Justice Schroeder, dated 24th November 1950, in disposing of a motion made in the action by

Westminster Bank Limited. The action was commenced by writ issued on the 9th July 1948, against Barcelona Traction, Light and Power Company Limited, as defendant, by National Trust Company Limited, as plaintiff, suing as trustee under certain trust deeds made by the defendant by way of security for certain bond issues of the defendant. The claim endorsed on the writ is for the administration and execution by the Court of these trust deeds, for the appointment of a receiver and manager, and to have the mortgage and charge contained in or created by the trust deeds enforced by sale, foreclosure or otherwise. The writ was served on the defendant on the day of its issue. An appearance was entered for the defendant, but no statement of claim has been delivered, nor has any other proceeding been taken in the way of bringing the action to trial or judgment.

On the 15th July 1948, on the application of the plaintiff and in the presence of counsel for the defendant, an order was made in the action by Mr. Justice Schroeder appointing G. T. Clarkson receiver, on behalf of the plaintiff and all holders of the bonds secured by two trust mortgages of which the plaintiff was trustee, of all the undertaking, property and assets comprised in or subject to the trusts of, or mortgaged or charged by or pursuant to the trust deeds made to the plaintiff as trustee, and "also to manage the undertaking of the defendant and to act at once and until the trial or until further order". The order appointing the receiver and manager contained many other provisions, including an order "that no action at law or other suit or proceeding shall be taken or continued against the defendant or the said receiver and manager without leave of this Court first being obtained".

The defendant is a company incorporated under the laws of the Dominion of Canada, and has its head office in Toronto. It has large interests in companies operating certain businesses and undertakings in Spain, but does not itself carry on any of these businesses. It is a holding company and its assets, in large part, consist of the shares, and of the secured and unsecured obligations, of these subsidiary companies carrying on undertakings in Spain, where they have tangible assets of great value. The defendant has outstanding three large issues of its own bonds. There is an issue of £2,684,900 principal amount of Consolidated 6½% "Prior Lien Bonds". There is another issue of £1,561,920

principal amount of 5½% "First Mortgage Bonds". This latter issue is exclusive of £2,640,000 par value of bonds of the same series, later referred to. There is a third issue of 61,895,500 pesetas principal amount of 6%, 45-year bonds. These last are ordinarily referred to as "Peseta Bonds", being payable in pesetas.

The plaintiff in the action is the trustee for bondholders under the trust deeds securing the "Prior Lien Bonds" and the "First Mortgage Bonds".

The Westminster Bank is the trustee for bondholders under a trust deed dated 1st May 1927 securing the peseta bonds. By this trust deed the defendant specifically charged "by way of first, fixed and specific charge" as security for payment of its peseta bonds the £2,640,000 par value of its first mortgage bonds before referred to. These latter bonds are, in turn, secured by the trust deed under which the plaintiff in the action is trustee both for the holders of the £1,561,920 principal amount of 5½% first mortgage bonds already mentioned, and for the holder of the £2,640,000 par value of 5½% first mortgage bonds charged specifically as security for the peseta bonds.

The trust deed securing the 5½% first mortgage bonds contains the following provision in para. 5:

"5. No bond shall be issued, or if issued shall be obligatory or entitle the holder to the benefit of the security hereby created until it has been certified by or on behalf of the Trustee in the form, or substantially in the form, set out in the First Schedule hereto or in some other form approved by the Trustee. Pending the delivery of lithographed or engraved bonds to the Trustee, the Company may issue and the Trustee certify interim bonds, with or without coupons, in such form and in such amounts as the Trustee and the Company may approve entitling the holders thereof to definitive bonds when the same are prepared, and pending such exchange the holders of the said interim bonds shall be deemed to be bondholders and entitled to the benefit and security of this Indenture to the same extent and in the same manner as though the said exchange had actually been made.

"PROVIDED that in lieu of interim bonds the Company may issue and the Trustee certify transferable certificates to bearer or otherwise entitling the holders and their transferees or the bearer, as the case may be, to the bonds therein mentioned, but the total amount of bonds covered by such certificates shall not

exceed the amount of bonds hereby authorized. The holders of such certificates shall be deemed to be holders of the bonds covered thereby until the same are exchanged for the bonds therein mentioned."

Westminster Bank, as trustee for the peseta bondholders, holds £2,640,000 par value of 5½% first mortgage bonds in the form of interim certificates. The trust deed charging the 5½% first mortgage bonds for the security of the peseta bondholders provides in clause 12 as follows:

"All bonds, shares or other securities for the time being forming part of the mortgaged premises, or the scrip, certificates or other documents of title representing the same, or the title thereto, shall be deposited with the Trustee or its nominees, and the same shall, subject as aforesaid, be deposited with or issued or transferred to or otherwise duly vested in the Trustee or its nominees, to be held by it upon the trusts and with and subject to the powers and provisions herein declared and contained concerning the same. The Trustee shall have full right and liberty to accept delivery of all or any of the bonds, shares or securities for the time being comprised in or subject to the charge created by these presents in the form of Interim Scrip or Certificates without being under any liability to require the deposit of definitive bonds, shares or securities."

The interim certificates held by Westminster Bank provide that the bearer of a certificate is entitled to receive definitive bonds from the defendant company of the aggregate value of the amount stated in them, with interest coupons attached, and a further provision that: "When the Definitive Bonds are ready for delivery they will be deposited with the Trustee or its Agent, and thereupon against presentation and surrender of this Certificate, the Bearer thereof will be entitled to receive the Definitive Bonds to which this Certificate relates." Each of the interim certificates bears upon its face the trustee's certificate in the following terms: "This Interim Bond Certificate is one of the Interim Bond Certificates referred to in the Deed of Trust dated the 1st day of December, 1911, and the Deeds supplemental thereto herein mentioned."

Some of the affairs of the defendant company and of its subsidiaries became much disturbed during the revolutionary war that broke out in Spain in the year 1936 and continued for

some years. Restrictions were placed upon the export of sterling currency from Spain, and the payment of interest upon some of the defendant's outstanding bonds was interrupted. There have been other interruptions in the operations of the defendant's subsidiaries in Spain, and the defendant itself, although it is a Canadian company having no operations or office in Spain, has been declared bankrupt by a Spanish Court, and there is opposition to the defendant's efforts to have the declaration set aside, although the defendant is far from bankrupt. There would appear also to be substantial grounds for thinking that certain individuals in Spain, with money and influence, are desirous of acquiring control of the defendant and some of its subsidiaries, or of the undertakings in which the defendant is interested, and that these persons have made some progress with their efforts in that direction.

On the 22nd July 1948, upon motion of the plaintiff in the action and of the receiver and manager, in the presence of counsel for the defendant, an order was made declaring that the interest of the defendant in the £2,640,000 par value of 5½% first mortgage bonds of the defendant specifically charged by the defendant as security for the 6% 45-year bonds of the defendant (that is, the peseta bonds), issued under an indenture made on the 1st May 1927 between the defendant, of the one part, and the Westminster Bank Limited, of the other part, is part of the undertaking, property and assets of which the said receiver and manager was appointed receiver and manager by the order made in the action on the 15th July 1948. The order further provided in para. 2 that the receiver and manager be, and he was thereby, "authorized and empowered to take such steps, if any (including without limiting the generality of the foregoing the institution either personally or by his agent or attorney of any suit, proceeding or action at law whether in England or elsewhere) as the said receiver and manager may in his discretion consider desirable to protect, or otherwise relative to, the interest of the defendant in the said 5½% First Mortgage Bonds of the defendant so charged; provided, however, that without further order the said receiver and manager shall not consent to the sale or other disposition of the said 5½% First Mortgage Bonds so charged or any of them". It was further ordered, by para. 3, and the receiver and manager was "authorized and empowered

in the event of any suit or proceeding at law being instituted whether in England or elsewhere by another or others relative to the First Mortgage Bonds so charged or any of them or the sale or other disposition of the said First Mortgage Bonds so charged or any of them and coming to his notice, to intervene in or otherwise act in relation to any such suit, proceeding or action at law" as he might, in his discretion, consider desirable or expedient, and to take legal and other advice relative to the interest of the defendant in the said first mortgage bonds, and the protection thereof, and to rely thereon, provided always that notwithstanding any advice or opinion so obtained, the discretion conferred upon the receiver and manager under the provisions of paras. 2 and 3 of the order should remain unimpaired.

On the 28th July 1948 another order was made in the action upon motion by counsel on behalf of the plaintiff and of the receiver and manager, and in the presence of counsel for the defendant. I think it necessary, for present purposes, to refer to only one paragraph of this order, which provided that the receiver and manager be and he was thereby "directed to refrain until further order of the Court from issuing or consenting to the issue of lithographed or engraved Bonds of the defendant in exchange for the Interim Bond Certificates of the defendant presently held by the said Westminster Bank Limited as part of the mortgaged premises" under the indenture of the 1st May 1927.

In April 1949 the Westminster Bank forwarded the interim bond certificates it held to its solicitors in Toronto for presentation, for the purpose of exchanging the said certificates for definitive 5½% first mortgage bonds of the defendant. In May 1949 the interim certificates were presented to the receiver and manager, and to the plaintiff, with the request for exchange into bearer definitive bonds of a like aggregate principal amount. Exchange was refused. Mr. G. T. Clarkson, who had first been appointed as trustee and manager, died about a year after his appointment, and John Grant Glassco was appointed receiver and manager in his stead by order of the 25th June 1949. In the month of September 1949 the Westminster Bank, by its solicitors, gave notice, on behalf of the Bank, that the Court would be moved in the action on the 14th September 1949, for an order giving the Bank leave to institute proceedings by way of action or otherwise in this Court against the receiver and manager of

the defendant and against the defendant, along with the plaintiff, for an order or judgment for delivery to the plaintiff of £2,640,000 principal amount of definitive 5½% first mortgage bonds of the defendant, in exchange for an equal aggregate principal amount of 5½% first mortgage interim bond certificates, and for a declaration of its rights to have such first mortgage bonds, with interest coupons attached, so executed, certified and delivered, and for such further and other order as to the Court might seem meet.

By consent of counsel, the motion as initially framed was turned into a motion for the following relief:

“(a) for an order or judgment for delivery to the applicant of £2,640,000 principal amount of Definitive 5½ Per Cent. (payable in Pesetas) First Mortgage Bonds of the defendant with all interest coupons due or to become due on and after June 1, 1948, attached duly executed, certified and delivered in accordance with the provisions of the Trust Deed dated December 1, 1911, and Supplemental Trust Deeds thereto securing the said bonds and interim bond certificates in exchange for an equal aggregate principal amount of 5½ Per Cent. (payable in Pesetas) First Mortgage Bond Interim Bond certificates held by the applicant;

“(b) for a declaration of the rights of the applicant to have such 5½ Per Cent. (payable in Pesetas) First Mortgage Bonds with such interest coupons thereto attached so executed, certified and delivered;

“(c) for such further or other order as to this Honourable Court may seem meet.”

I do not know that there is any precise authority for this procedure, but all the parties concerned are satisfied with the procedure adopted by them to dispose of the matter. The motion was heard before Mr. Justice Schroeder, and there were present on the argument counsel for Westminster Bank Limited, for the plaintiff, for the defendant, and for Mr. Glassco, the receiver and manager. After hearing argument Mr. Justice Schroeder reserved his decision, and later, on the 24th November 1950, made an order by which he declared that Westminster Bank Limited was entitled to £2,640,000 principal amount of definitive 5½% (payable in pesetas) first mortgage bonds of the defendant, secured by the trust deed dated 1st December 1911,

and by supplemental trust deeds made by the defendant in favour of the plaintiff as trustee, with the interest coupons, and executed, certified and delivered in the manner and subject to the terms and conditions thereafter in the order set forth, against presentation and surrender of interim bond certificates as described in the order for an amount of £2,640,000 principal amount of 5½% (payable in pesetas) first mortgage bonds of the defendant. The order further declared that the sole interest coupons to be attached to the definitive bonds to which Westminster Bank was entitled should be coupons due, or to become due, on and after the 1st December 1948, the first of such interest coupons to represent the interest for the broken period from the 15th June 1948 to the 1st December 1948.

It was further ordered (a) that the receiver and manager forthwith cause to be prepared definitive 5½% first mortgage bonds in the aggregate principal amount of £2,640,000, in the form prescribed by the trust deed and supplemental trust deeds, with interest coupons attached, as provided in para. 2 of the order, and with such alterations therein or such endorsements thereon as might be requisite to give effect to the provisions of the order; a direction was given by the order as to the denominations of the individual bonds to be delivered; (b) that the defendant thereupon forthwith cause the definitive bonds to be signed and countersigned, and the interest coupons to have engraved or lithographed thereon the signature of its treasurer or secretary in the manner prescribed in the trust deed and supplemental trust deeds; (c) that the receiver and manager do thereupon forthwith cause the corporate seal of the defendant to be affixed to the definitive bonds so signed and countersigned, and do then, provided Westminster Bank should have complied with the conditions set forth in para. 4 of the order, deposit the definitive bonds with the plaintiff as trustee under the trust deed and supplemental trust deeds; (d) that upon the deposit of the said definitive bonds as aforesaid, and against presentation and surrender to it of the said interim bond certificates by or on behalf of Westminster Bank, the plaintiff, as trustee under the said trust deed and supplemental trust deeds, do forthwith certify the said definitive bonds and deliver the same in Canada to or to the order of Westminster Bank.

By para. 4 of the order it is provided (a) that prior to the deposit of the definitive bonds with the plaintiff, as provided in para. 3(c) of the order, Westminster Bank do pay to the receiver and manager an amount equal to the expense of the preparation of the definitive bonds, and do give security to the satisfaction of the receiver and manager for any expense that may subsequently be incurred in the preparation of definitive bonds required for the purpose of any subsequent exchange in respect of the definitive bonds to which Westminster Bank Limited is entitled; (b) that Westminster Bank do indemnify the receiver and manager to his satisfaction from and against all claims, penalties, costs, charges and expenses for and in respect of stamp or similar duties which may be payable, made or claimed under the laws of the United Kingdom by reason of the delivery of the said definitive bonds. Leave is reserved to the receiver and manager, the plaintiff, the defendant and Westminster Bank, or any of them, to apply for such further orders and directions as may be necessary to give effect to and carry the order into operation.

Paragraph 6 provides that the order shall take effect notwithstanding para. 3 of the order made in the action on the 28th July 1948, which had directed the receiver and manager to refrain, until further order of the Court, from issuing or consenting to the definitive bonds that Westminster Bank was asking for.

Paragraph 7 of the order provided for costs of the motion.

From this order an appeal was taken to this Court by the defendant. Thereupon the applicant, Westminster Bank, gave notice that it intended, on the hearing of the defendant's appeal, to contend that the order of Schroeder J. should be varied in certain particulars. No other party appealed from the order of Schroeder J., but counsel for the plaintiff and counsel for the receiver and manager, as well as counsel for the defendant, addressed argument in support of defendant's appeal.

It would be well to state the position of the several parties before discussing the propriety of the order of Schroeder J.

It is not disputed that Westminster Bank, as trustee for the peseta bondholders, has a valid first specific charge upon £2,640,000 par value of the defendant company's 5½% first mortgage bonds. The bonds themselves are not in the physical

possession of Westminster Bank, and the defendant company has not made the bonds, although all proper and necessary steps have been taken by the company to authorize the making of the bonds and their issue. The bonds have been validly made the subject of a first specific charge in favour of Westminster Bank, as trustee for the peseta bondholders. The bank is the lawful holder of interim certificates to the full amount of the par value of the bonds, and the company is under agreement to exchange these interim certificates for an agreed amount of definitive bonds at the bank's request. The bonds in question cannot be issued to anyone other than the bank. They are not available to the company or to the receiver and manager to issue otherwise than to Westminster Bank, as trustee for the peseta bondholders. It is only for that purpose that their issue has been authorized, and their specific charge for this purpose is not disputed. The interim certificates issued by the company and certified by the plaintiff are in themselves evidence of that.

The defendant company raises a question of the Statute of Limitations; also it charges laches and delay on the part of the bank. Both of these matters were disposed of adversely to the defendant by Mr. Justice Schroeder. In my opinion he was right on both matters and no further discussion of either of them is required.

The substantial contest arises from the appointment of a receiver and manager. The first mortgage bonds of the defendant for which Westminster Bank seeks to have definitive bonds in exchange for the interim certificates it holds, are not included in any specific charge of the trust deed securing either the prior lien bonds or the first mortgage bonds, of which the plaintiff is trustee. The order appointing a receiver and manager was made on 15th June 1948. The first charge upon the £2,640,000 5½% first mortgage bonds is that created by the trust deed of 1st May 1927, of which the Westminster Bank is trustee, and it also holds the interim certificates for all these bonds.

The receiver and manager has nothing in his possession representing these bonds, or any interest in them. It was doubtless to give some appearance of substance to its position that an order was obtained, on motion of counsel on behalf of the plaintiff and of the receiver and manager, on 22nd July 1948, one week after the order appointing a receiver and manager, declar-

ing "that the interest of the defendant in £2,640,000 par value of 5½% first mortgage bonds of the defendant specifically charged by the defendant as security for the Six Per Cent Forty-five Year Bonds of the defendant issued under an indenture made the 1st day of May, 1927, between the defendant of the one part and Westminster Bank Limited of the other part is part of the undertaking, property and assets of which the said receiver and manager was appointed receiver and manager by the order made herein on the 15th day of July 1948".

Whatever may have been the effect of this order, it in no degree altered the fact that Westminster Bank, and it alone, was entitled to have from the company definitive bonds for the amount of £2,640,000 of the company's first mortgage issue, to hold on the terms of the trust deed of 1st May 1927. Neither the company nor the receiver and manager is entitled to divert £1 from the amount of bonds the bank is entitled to receive in exchange for interim certificates, and to hold in trust as provided in the trust deed: *Parsons et al. v. The Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476, C.R. [1913] A.C. 259; *Watson v. Imperial Steel Corporation Ltd.* (1925), 29 O.W.N. 81.

That the company itself is under obligation to the bank to make the exchange from interim certificates to definitive bonds that the bank desires is not open to question. The whole question arises from the appointment of a receiver and manager. The bank's request is no doubt made at this time for substantial reasons. The unsettled state of the affairs of the company and its subsidiaries and the very evident danger there is that, through no fault of any of the parties now before this Court, heavy loss may come to some of the bondholders of the company and to the company itself, make it the duty of any trustee to put the affairs of his trust in good order. The opponents of the Westminster Bank in this proceeding attribute to the bank an intention to sell its bond-holdings to interests who are supposed to be actively endeavouring to obtain control of the company, or to obtain some of its important holdings. It is suggested that it is to make its holdings a more desirable purchase to such interests that the bank asks for the exchange. There is no evidence that any such opportunity is, or has been, available to Westminster Bank. It is set forth in a report of the receiver and manager under date of 27th September 1949 that:

"On June 15, 1948 Westminster Bank Limited as trustee under the Peseta Trust Deed gave the defendant notice that by reason of the default in interest on the Peseta Bonds it intended to sell the £2,640,000 principal amount of First Mortgage Bonds held by it. On June 24, 1948, Westminster Bank Limited requested of the defendant definitive First Mortgage Bonds in exchange for the certificates held by it."

The present action was commenced on 9th July 1948. The first claim endorsed upon the writ of summons by which this action was commenced is "for the administration and execution by the Court of the trusts of the Prior Lien Trust Deed and the trusts of the First Mortgage Trust Deed". In the circumstances then probably well known to all the parties concerned, and in view particularly of the bankruptcy declaration by a Court in Spain against the defendant, it is reasonable that the trustees concerned under the several trust mortgages should be prepared to act quickly upon any opportunity to get out. There is nothing on the record before us to warrant an opinion that the Westminster Bank has acted in any manner that would warrant the Court in depriving it of any of its rights as trustee for the peseta bondholders. The holders of other bonds of the defendant, for whom the plaintiff is trustee, are not restricted in disposing of their bonds on the market. The bank has a clear right against the company to the exchange it has asked for, and, in my opinion, the receiver and manager has no status to interfere. He has, however, acting doubtless upon the advice of the plaintiff's solicitors, seen fit to join with the plaintiff in procuring the orders in relation to the exchange of bonds hereinbefore referred to. In view of this intrusion into the matter, and, further, in view of the assistance the receiver and manager may be capable of giving in the carrying out of the exchange that has been ordered, I think that the judgment should provide that the receiver and manager, as an officer of the Court, should co-operate with the defendant in the preparation and execution and delivery to the plaintiff of the bonds to which Westminster Bank is entitled, the directions contained in clause 3 of the formal judgment otherwise to remain unaltered.

Clause 4 of the judgment, as entered, is to be stricken out, and in lieu thereof there shall be a direction that Westminster Bank, on receipt of the bonds duly executed and certified, do pay

to the receiver and manager such sum as the latter would reasonably be entitled to be paid by the defendant for his costs and expenses in and about the services to be performed by him under clause 3 of the judgment; Westminster Bank to be entitled to charge the said sum in its account with the defendant as an expense incurred, that the defendant should pay. Clause 5 of the judgment as entered is amended by striking out all words after the word "operation" in the fifth line thereof.

The Westminster Bank is entitled to its costs of this appeal, to be paid by the defendant forthwith after taxation.

Before parting with this appeal I consider it my duty to call attention to the practice that is developing in this Province in cases where it is deemed desirable to appoint a receiver and manager to have possession of a company's assets and undertaking and the management of its business pending litigation. It is not uncommon to appoint a receiver and manager for an indefinite period, as was done in this case. The receiver and manager was appointed in July 1948 and is still carrying on. The action meanwhile is standing still. No pleadings have been delivered, and, so far as appears, the desired end of the action seems to have been reached with the appointment of a receiver and manager.

In *In re Newdigate Colliery, Limited; Newdegate v. The Company*, [1912] 1 Ch. 468 at 472, the Master of the Rolls said: "... I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency." Three months has been a period commonly applied in England, with a right reserved to apply for extension. The appointment, as in this case, without any time-limit and continued for several years without taking any steps towards a sale, or even to establish a cause of action, seems not good practice, in view of the large interests removed from the management of a board of directors and placed in the hands of the receiver.

I find, on reviewing what I have written, that there has been inadvertently omitted, in the process of an earlier revision, what I had originally written that dealt with a preliminary objection to the defendant's appeal, made by counsel for the Westminster Bank Limited. Counsel for the Westminster Bank, at the open-

ing of argument of the appeal, had taken the objection that the defendant had no right of appeal, its powers having become vested in the receiver and manager. The objection, in my opinion, was not validly taken as, so far as the £2,640,000 of first mortgage bonds are concerned, the company retains such powers as it had in that regard.

Order below varied.

Solicitors for the plaintiff and for the receiver and manager: Tilley, Carson, Morlock & McCrimmon and Fraser, Beatty, Tucker, McIntosh & Stewart, Toronto.

Solicitors for the defendant, appellant: Blake, Anglin, Osler & Cassels, Toronto.

Solicitors for the applicant, respondent: McMillan, Binch, Wilkinson, Stuart, Berry & Wright, Toronto.

[AYLEN J.]

Shepherd v. Royal Insurance Company Limited.

Aeronautics—Operation of Aircraft in Breach of Regulations—"Aerobatics"—"Acrobatic flying"—Dangerously Low Altitude—The Air Regulations, Part VI, s. 2(a), (c).

Insurance—Aviation Accident Insurance—Limits of Risk—Prohibited Flying—Breach of The Air Regulations, 1948, Part VI, s. 2.

A policy of "aviation accident" insurance expressly excluded loss caused or contributed to by "aerobatics at an altitude less than 1,000 feet over the terrain". *Held*, there was no difference in meaning between the word "aerobatics" as used in the policy and the term "acrobatic flying" as used in Part VI, s. 2(a) of The Air Regulations, 1948. Both expressions contemplated something in the nature of "stunts", and would not include straight flying, even if it was done at an extremely low altitude, with sudden rises over obstacles such as houses.

The term "low altitude" as used in Part VI, s. 2(c) of The Air Regulations, 1948, is not defined in the Regulations, and is incapable of definition, since what is prohibited is "flying which, by reason of low altitude or proximity to persons or dwellings, is dangerous to public safety", and what is a safe height must vary according to circumstances; over some terrain it would not be safe to fly at less than 10,000 feet, while in other places much less might be required.

Insurance—Warranties and Representations—Non-disclosure in Application—Materiality—Belief of Applicant—Aviation Accident Insurance—The Insurance Act, R.S.O. 1937, c. 256, s. 212, stat. con. 2.

Aeronautics—Licences—Suspension of Pilot's Licence—Notification—The Air Regulations, 1948, Part IV, s. 6.

S, a licensed aircraft pilot, was involved in an accident on 8th November 1947. On 30th June 1948 he was notified that as a consequence of the accident his licence had been suspended for six months, from 8th November 1947 to 7th May 1948. Subsequently, in applying for a

policy of insurance, S answered in the negative a question as to whether his licence had ever been cancelled, withdrawn or suspended, although, in answer to another question, he gave full particulars of the 1947 accident.

Held, the answer as to the suspension of the licence should not be regarded as fraudulent, or as a misrepresentation that could reasonably have influenced the insurer in issuing the policy. S probably considered that there had been no real suspension, since his right to fly was not interrupted, and in any case the insurer, in view of his other answer, made a full investigation of the circumstances of the accident and, had it been interested in the action taken by the Department, could easily have ascertained the full facts. *Mutual Life Insurance Company of New York v. Ontario Metal Products Company*, [1925] A.C. 344 at 352; *Gillespie et al. v. British America Fire and Life Assurance Company* (1849), 7 U.C.Q.B. 108 at 119, applied.

AN ACTION under a policy of insurance.

9th to 12th April and 28th to 30th May 1951. The action was tried by AYLEN J. without a jury at Chatham and Toronto.

G. W. Mason, K.C., and *T. M. Mungovan, K.C.*, for the plaintiff.
B. V. Elliot, K.C., for the defendant.

21st June 1951. AYLEN J.:—The plaintiff in this action claims as the beneficiary named in an "Aviation Accident" insurance policy issued by the defendant company under date of the 23rd September 1948, and taking effect from 12 o'clock noon, 20th October 1948, to 12 o'clock noon, 20th October 1949. The policy was issued to Ross Clayton Shepherd, the husband of the plaintiff, who lost his life in an aviation accident which happened on the 2nd July 1949, some time after 5 o'clock in the afternoon. His passenger, Albert Janssens, was also killed. The plane crashed in a farmer's field located north of a road known as the third concession road in the gore of Chatham township in the county of Kent and two or three miles west of the village of Wallaceburg.

The defendant company disputes the plaintiff's claim on two grounds, the first being that Ross Shepherd, in applying for the policy in question, made a false answer to one of the questions he was called upon to answer and thereby was guilty of a fraudulent misrepresentation, or at least made a false statement of fact material to the risk which was intended to be and was relied on by the defendant in issuing the policy. The second ground of defence is that at the time of the crash the aircraft in question was being operated by the insured contrary to Canadian Air Regulations and therefore contrary to certain conditions attached to the policy.

Dealing with the first ground of defence, there is attached to the policy a copy of the application, which requires the applicant to disclose certain facts which the applicant declares to be true and material to the risk.

Item 18 on that application reads as follows: "The applicant's licence has never been cancelled, withdrawn or suspended except as follows:" The answer given by Shepherd to that question was "Nil."

Item 20 in the same application reads as follows: "The applicant has been involved in no Aviation Accidents, except as follows:" The answer to that question made by Shepherd reads as follows: "Nov. 8/47—St. Catharines, Ont. over shot landing and crashed in ditch off end of runway."

The charge of fraud made against Shepherd is based on an allegation of the defendant company that in fact Shepherd's licence had, on one occasion prior to the issuing of the policy, been suspended. Under date 30th June 1948 (ex. 22) the Department of Transport at Ottawa wrote to Shepherd as follows:

"The proceedings of the Board of Enquiry convened to investigate the accident of Anson V aircraft CF-EHK, which occurred on November 8th, 1947, at St. Catharines, Ontario, while you were pilot in charge, have now been approved.

"Investigation revealed that, although the aircraft was not certified for instrument or night flying and you were not the holder of an instrument rating, a portion of this flight was conducted under Instrument Flight Rules and after dark. Further, the circumstances of this flight showed neglect of those precautions required by the ordinary practice of the air or by the special circumstances of the case.

"As a result of the above-mentioned infractions of Air Regulations, the suspension of your Pilot's Certificate for a period of six months has been authorized. It has now been decided that the suspension shall cover the period from November 8th 1947, to May 7th, 1948, inclusive. This action has been taken under Part II, para 11(1) and Part VIII paras 16, 18 and 22 of Air Regulations 1938, with amendments thereto. As this endorsement has not yet been made, your Pilot's Certificate is to be forwarded to this office without delay.

“Pending return of the Certificate, this letter will constitute your temporary Public Transport Pilot’s Authority, subject to the same conditions and limitations as those of Public Transport Pilot’s Certificate No. 667.”

It will be noted from the above letter that Shepherd’s licence was suspended from 8th November 1947 to 7th May 1948. In other words, the period of suspension had elapsed before Shepherd was ever notified of the suspension. The power to suspend a pilot’s licence is contained in Part IV, s. 6 of The Air Regulations, 1948 ([1948] S.O.R. 1348), passed pursuant to The Aeronautics Act, R.S.C. 1927, c. 3, which reads in part as follows: “A certificate issued to any pilot, engineer, inspector or airport traffic control officer may be suspended or cancelled at any time by the Minister for cause . . .”

It was argued on behalf of the plaintiff that s. 6 did not give power to the Minister to suspend a licence *nunc pro tunc*. Certainly there was no effective suspension of Shepherd’s licence and what appears to be something in the nature of a formal suspension never interfered with Shepherd’s right to fly and in fact the last paragraph of the letter confirms Shepherd’s right to fly. I consider that there was no real suspension of Shepherd’s licence. It does not seem reasonable to regard as a real suspension an order which informs Shepherd in June 1948 that he cannot fly from 8th November 1947 to 7th May 1948. It seems highly probable to me that Shepherd, in answering item 18, did not consider that his licence had in fact been suspended, and in answering item 20 he did give full particulars of the accident which led to the so-called suspension. In view of the information given to the defendant company in item 20, the company itself made a thorough investigation of the accident described and apparently came to the conclusion that it did not reflect on Shepherd’s ability as a pilot. I do not think the company was at all interested in what action the Department might have taken with regard to the accident described by Shepherd in the application. Certainly if it had been interested, it would have been a very simple matter in the course of its investigation to have ascertained whether any departmental action had been taken.

Clause 2 of Part IV, the statutory conditions attached to the policy, reads in part as follows: “All statements made by the In-

sured upon the application for this Policy shall, in the absence of fraud, be deemed representations and not warranties . . .”

In *Mutual Life Insurance Company of New York v. Ontario Metal Products Company, Limited*, [1925] A.C. 344 at 352, [1925] 1 D.L.R. 583, [1925] 1 W.W.R. 362, the law as to misstatements of fact is stated as follows: “. . . the non-disclosure or misstatement was not material to the contract and therefore, under the law of Ontario, is not a ground for avoiding it.”

And in *Gillespie et al. v. British America Fire and Life Assurance Company* (1849), 7 U.C.Q.B. 108 at 119: “. . . there is a difference between a covenant or condition and a mere representation; for in the latter case, if anything has been falsely represented which would increase the risk, the policy will not be avoided by it where no fraud was intended, unless the loss can be shewn to have arisen from the circumstances in regard to which the insurer has been misled.”

It is my view that under the circumstances it cannot be said that Shepherd was guilty of fraud, nor was the misrepresentation, if any, made by him, a misrepresentation which would reasonably have influenced the company in issuing this policy. Certainly it has no bearing on the cause of the accident.

With regard to the second ground of defence, namely that Shepherd was, at the time of the accident, flying contrary to The Air Regulations, 1948, and therefore contrary to the terms of the policy, I should first refer to the policy itself, which contains a special endorsement entitled “Endorsement No. 1” which extends the term “aviation accident” as defined in Part II of the policy to include an accident “While flying as a pilot holding a valid and current license issued by the Department of Transport”. In this case Shepherd at the time of the accident did hold such a licence. Endorsement No. 1 goes on, however, to provide that it shall apply only “while the Insured is flying in a powered aircraft bearing an unrestricted Certificate of Airworthiness, and shall not apply with respect to an accident occurring while the Insured, as pilot, is operating an aircraft in violation of its Certificate of Airworthiness or in violation of the terms of his pilots license or of the Air Regulations of the Department of Transport or of the applicable regulations of the competent authority of a foreign state in which the aircraft may be operated”. The aircraft in question did have a certificate of airworthiness. In the main

body of the policy itself (Part II, clause 9) it is provided that no insurance shall be payable for loss caused or contributed to by “(e) aerobatics at an altitude less than 1000 feet over the terrain”.

The Air Regulations which affect this matter are to be found in Part VI entitled “Dangerous Flying” and particularly in s. 2 of that part. Paragraph *a* of that section provides that no person in any aircraft shall “carry out any acrobatic flying over any city or town area or populous district” and para. *c* provides that no person in any aircraft shall “carry out any flying which, by reason of low altitude or proximity to persons or dwellings, is dangerous to public safety”.

On the 2nd July 1949, when this accident happened, the deceased Shepherd was operating a flying company known as Inter-Provincial Air Services Ltd. with headquarters at Windsor, Ontario, and on that day also an annual fair sponsored by a service club was taking place at Wallaceburg. Shepherd, for two or three years, had been in the habit of sending one or two of his planes to the Wallaceburg Fair where he took up passengers for short flights. On the 2nd July 1949 two of Shepherd's machines were at Wallaceburg and were operating from a field located on the farm of Albert Janssens on farm lot no. 12, north of the 3rd concession road. It was an extremely hot day, the temperature being about 97 in the shade, and there was little business for Shepherd's planes. The witness Norman Durocher of Windsor was also present and assisting Shepherd and during the morning of 2nd July he took the Piper cruiser aircraft, which later crashed, and flew it in an informal test. Some time in the afternoon, and prior to the crash, he took a passenger up in the same machine and at all times it seemed to be functioning normally and well. Later in the afternoon Shepherd decided that they might as well pack up their equipment and return to Windsor because business was so poor. While Durocher and another person associated with Shepherd, named William McClat, readied one of the machines, which was a Piper cub, for the return journey, Shepherd apparently decided that he would take Albert Janssens for a short flight as a mark of appreciation for the use of Janssens's field. There is some difficulty in determining the time that Shepherd took off with Janssens but it was apparently about 5 p.m. or shortly thereafter.

At about the same time or a little later (the exact time is uncertain) the witness James A. Martin was sitting in a park at Wallaceburg overlooking the Sydenham River and saw a plane flying down the river and very low. He says that as nearly as he could tell the fuselage of the plane he saw was red with black lettering. As he watched the plane it swooped over a bridge, still flying very low, and a comparatively short time afterwards he heard the sound of a fire siren.

Meanwhile Corporal William Gordon Pritchett of the R.C. M.P. was about to leave his office in Wallaceburg. As he was shutting the window he also noticed a plane flying very low along the Sydenham River. He says the plane he saw had a yellow fuselage with some red on the nose and it was flying so dangerously low that he was alarmed because he knew there were planes in the vicinity taking up passengers from the fair, and he thought he should intervene if the type of flying he observed was being followed in taking up passengers. He left his office for the purpose of investigating, picked up his mail, went downstairs and headed for the Post Office, and as he was passing the fire hall a few minutes later he was told that a plane had crashed on the 3rd concession.

It is not admitted that the plane which actually crashed was the same plane which Corporal Pritchett saw or the same plane which the witness Martin saw. Exhibit 27 is a photograph of the plane which actually crashed and shows that the top of the wings are a pinkish colour and the nose of the plane is pink or red and that there is a red strip down the top of the fuselage. The rest of the fuselage and the tail assembly are yellowish in colour. A plane so coloured might well be taken by one person to be red and by another to be yellow. There may, of course, have been other planes in the vicinity and flying low but I think that is unlikely, although the witnesses do not agree as to the time when they observed a plane flying low.

Assuming that the plaintiff's objections are well founded and that the plane seen by Pritchett and Martin, if it was the same plane, was not the Shepherd plane, there is additional evidence which directly identifies the Shepherd plane. Mrs. Madelaide Punnewaert who lives with her husband, Maurice Punnewaert, on farm line just south of the 3rd concession road, had been to town and returned to the farm about 5 p.m.. About 15 minutes later

she heard an aeroplane which "sounded low" and attracted her attention. She came out of the barn and watched the plane circle the barn. It then circled over a wheat field to the east of the Punnewaert farm, flying very low. It then turned north to the 3rd concession or slightly past the 3rd concession and then turned west. Mrs. Punnewaert was watching the plane throughout and saw it hit a tree shown at elevation 12956 on ex. 13. The plane seemed yellow to her, but there is no doubt that it was in fact the Shepherd plane. Mrs Punnewaert thinks that it was the under-carriage of the plane that hit the tree and then the left wing appeared to go down. It hit the ground and bounced a little, and after it came to rest a fire immediately started. Her husband was present but he was not watching the plane particularly, except that he says the plane appeared, from the sound, to be under power at all times.

The witness Alphonse Van Bastellar operates a farm on lot 10, immediately east of the Punnewaert farm. He also saw the Shepherd machine flying very low. He says also that the noise of the engine drew his attention to the machine. He saw it flying over the wheat field only three or four feet above the wheat. It then picked up altitude and soared over the house. Then it banked to go north and then west. Van Bastellar also saw the plane hit the tree and fall to the ground. The tree in question is a tree about 25 feet high and is shown on the plan ex. 13 as located on the Douglas A. Skinner farm.

A number of expert witnesses were called in this case whose evidence was based on the evidence of the actual eye-witnesses. Stewart Turner Grant, inspector of the Civil Aviation Department, inspected the wreckage of the plane the day following the accident. He says that the tree which was hit was 25 to 30 feet high and that about 75 feet from the tree there were marks on the ground and some yellow paint which were apparently caused by the aircraft. About 180 feet from those marks there was another gouge or hole in the ground and he concluded that the nose of the aircraft had hit the ground at that point. Both blades of the propeller were broken off, which indicated to Grant that the propeller had been going at a high rate of speed up to the time of the crash. It has been suggested by counsel for the plaintiff that Shepherd was in some difficulty and was attempting to land. Grant says that if that had been the case the engine

would have been turned off. The field itself, where the plane crashed, was level and quite an appropriate place to make a forced or emergency landing. It should be remembered in that connection that Shepherd was a very fine, experienced pilot with seven or eight thousand flying hours to his credit. That represents a great deal of flying, and if he were attempting to land it is difficult to understand why he could not have avoided hitting the tree.

Professor Thomas Richardson Lowden, who is a professor of aeronautical engineering at the University of Toronto, and whose standing was recognized, I think, by other expert witnesses, said that the fact that both blades of the propeller were broken off indicated to him that the plane was travelling fast immediately prior to the crash and that it was not engaged in normal flight, although he said it was possible, perhaps in view of the heat of the day that the plane hit an air-pocket, but that was only a possibility. Professor Lowden said that any plane flying under 2,000 feet except when taking off or landing, was flying dangerously low.

Turning again to The Air Regulations, 1948, and to s. 2(c) of Part VI, quoted above, it will be noted that what is forbidden is flying at a "low altitude" in proximity to persons or dwellings. The section does not attempt to define what is meant by flying at a "low altitude", nor would it be possible to do so. Over some terrain, flying under 10,000 feet would be too low but even over level country, such as that where this crash occurred, Shepherd was flying very much too low. Even if the standard set by Professor Lowden, and concurred in by the witness Baxter, namely that anything under 2,000 feet is dangerous, provides an unnecessarily wide margin of safety, nevertheless Shepherd was flying hundreds of feet lower than is required for even a reasonable degree of safety. Even the witness Warren, who was called by the plaintiff in reply, and who said that it was possible to fly as safely at 10 feet as at 10,000 feet, admitted that there was an element of danger in low flying.

I have come to the conclusion, based chiefly on the evidence of Mrs. Punnewaert, her husband, and Mr. Van Bastellar, that Shepherd was flying far too low, and I do not think there is any real evidence to support the contention of the plaintiff that Shepherd was faced with any sudden emergency.

There is one other question to be decided and that is whether Shepherd was guilty of "acrobatic flying over any city or town area or populous district" as mentioned in s. 2(a) of Part VI of The Air Regulations, 1948, or of "aerobatics" as forbidden by Part II, clause 9, of the policy. I do not think there is any difference between "aerobatics" and "acrobatics". The Shorter Oxford Dictionary describes "aerobatics" as "evolutions performed with an aeroplane". That definition is not of very much help. In Webster's New International Dictionary, 2nd ed. 1948, "aerobatics" is described as "performance of stunts, as nose-dives, etc." There are a great many such stunts in addition to nose-dives, but I think it is clear that the type of flying which may be described as "aerobatics" or "acrobatics" is not the type of flying in which Shepherd was engaged. While Shepherd was not engaged in "aerobatics" or "acrobatics", he was flying dangerously low and contrary to The Air Regulations, 1948, which was forbidden expressly by Endorsement No. 1 of the policy, and on that account, and on that account alone, this action must be dismissed.

With regard to the question of costs I consider that in view of the fact that the defendant made allegations of fraud against a person of good repute, who is now deceased, and they were not proved, I should use my discretionary powers as they have been used in some such cases before (see *Holmsted & Langton*, Ontario Judicature Act, 5th ed. 1940, p. 292, and particularly *Tenute v. Walsh* (1893), 24 O.R. 309) and deprive the successful defendant of costs. The action will therefore be dismissed, but without costs.

Action dismissed without costs.

Solicitors for the plaintiff: Mungovan & Mungovan, Toronto.

Solicitors for the defendant: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

[SPENCE J.]

Hollinger Bus Lines Limited v. Ontario Labour Relations Board.

Judgments and Orders — Declaratory Judgments — Discretion of Court — Declaration not to be Granted, where no Consequential Relief Sought, if Other Remedy Available — The Judicature Act, R.S.O. 1950, c. 190, s. 15(b).

The Court will not grant a declaratory judgment, where no consequential relief is sought, loosely, but will do so only in the exercise of a sound judicial discretion. It will not, *e.g.*, grant a declaration as to the jurisdiction of a board performing judicial or quasi-judicial duties, since that jurisdiction can be tested by the speedier remedies of certiorari or prohibition. A declaration in such circumstances, without consequential relief, would be a declaration "in the air".

Actions — Staying — Inherent Power of Court — Abuse of Process — Other, more Expeditious, Remedy Available — Action Deemed Frivolous and Vexatious — Rule 124.

There is no power under Rule 124 to dismiss or stay an action before pleadings have been delivered, on the ground that the endorsement on the writ discloses no reasonable cause of action. The Court has, however, inherent power, quite apart from Rule 124, to stay or dismiss an action that constitutes an abuse of the process of the Court. The plaintiff sued for an injunction to restrain the Ontario Labour Relations Board from dealing with an application for certification, and for declarations as to the Board's jurisdiction. *Held*, the action should be stayed under this inherent power. The relief sought could be obtained much more expeditiously by a summary application for certiorari or prohibition, and to permit the action to proceed to trial might paralyze the actions of the Board. In such circumstances, the issuance of the writ was an abuse of the process of the Court.

Certiorari — How Obtained — Impossibility of Claiming Certiorari by Action — Rules 229, 233, 622.

Certiorari, unlike mandamus, cannot be claimed in an action, but must be made the subject of a summary application under Rule 622. It makes no difference that it may be necessary to determine issues of fact on *viva voce* evidence, since there is provision for such a course under Rules 229 and 233.

AN APPLICATION by the defendant for an order staying the action.

The plaintiff's claim, as endorsed on the writ of summons, was as follows:

"(1) FOR A DECLARATION that the Defendant, in its decision, judgment or order, dated the 10th day of March, A.D. 1951, and hereinafter referred to as its Judgment in the Matter of Amalgamated Association of Street Electric Railway & Motor Coach Employees of America against the Plaintiff, being a Petition for Certification of a Union as bargaining representatives for certain of the employees of the Plaintiff, exceeded its jurisdiction in finding or was without jurisdiction to find that it was not open to the parties to the Collective Agreement, dated the 13th day of December, A.D. 1949, between the Plaintiff and Hollinger

Bus Lines Employees Association to terminate that Collective Agreement before its normal expiry date.

“(2) If the said Judgment is to be interpreted as a finding that the Collective Agreement, dated the 28th day of September, A.D. 1950 between the Plaintiff and Hollinger Bus Lines Employees Association and mentioned in the Judgment was not a valid and subsisting Collective Agreement, and/or was not a bar to the Petition for Certification above-mentioned, FOR A DECLARATION that the Defendant exceeded its jurisdiction or was without jurisdiction to make such a finding.

“(3) FOR A DECLARATION that the Collective Agreement, dated the 13th day of December, A.D. 1949, between the Plaintiff and Hollinger Bus Lines Employees Association was on the 28th day of September, A.D. 1950, a valid and subsisting Agreement and binding upon the parties thereto, and that on the said date the said parties were legally entitled to amend, revise, or terminate the said Agreement.

“(4) FOR A DECLARATION that the Agreement, dated the 28th day of September, A.D. 1950, between the Plaintiff and the Hollinger Bus Lines Employees Association was upon the said date, and continued to be, a valid and subsisting agreement binding upon the parties thereto; AND ALTERNATIVELY, that the said Agreement was an amendment or revision of the Collective Agreement dated the 13th day of December, A.D. 1949, and made pursuant to the terms of the last-mentioned Agreement.

“(5) The Plaintiff's claim is also against the Defendant FOR AN INJUNCTION (and also for an interim injunction) restraining the Defendant, and its members, officers, servants and agents:

“(a) From proceeding further with the said Petition for Certification; and

“(b) From hearing or entertaining any further Petition for Certification during the currency of the said Agreement dated the 28th day of September, A.D. 1950, hereinbefore mentioned, or any renewal or extension thereof, and at least until the trial of this action.”

6th and 15th June 1951. The application was heard by SPENCE J. in chambers at Toronto.

E. H. Silk, K.C., for the defendant, applicant.

Gordon N. Shaver, K.C., and *G. M. Paulin*, for the plaintiff, *contra*.

27th June 1951. SPENCE J.:—This is an application for an order staying an action which was made in chambers on the 1st June 1951, and further argued upon subsequent dates. Counsel for the respondent objected that the application should have been made in court rather than in chambers and that the notice of application, being in the form appropriate to chambers, was defective for an application in court, in that it did not set out the grounds on which the applicant relied.

The applicant later filed an additional notice of motion in which it set out the grounds as follows: "that the action is an abuse of the process of the Court; that no cause of action is disclosed; and that the action is frivolous and vexatious, pursuant to the inherent powers vested in the Court and pursuant to Rule 124 of the Consolidated Rules of Practice and Procedure of the Supreme Court of Ontario." It is my intention to deal first with the ground that no cause of action is disclosed; then with the action as frivolous and vexatious and finally with the ground that the action is an abuse of the process of the Court.

The application for a stay of the action on the ground that no cause of action is disclosed, depends on ss. 68 and 69 of The Labour Relations Act, R.S.O. 1950, c. 194. Section 68 of the said statute provides in part:

"(1) The Board shall have exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and without limiting the generality of the foregoing, if any question arises in any proceeding, . . .

"(c) as to whether a collective agreement has been made or as to whether it is in operation or as to who the parties are or who are bound by it or on whose behalf it was made. . . .

the decision of the Board thereon shall be final and conclusive for all purposes, but nevertheless the Board may at any time if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."

Section 69 provides: "No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or pro-

ceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.”

The plaintiff company issued and served the writ of summons and the defendant Board has made this application without having filed an appearance. It was said by Orde J.A. in *Kingdom Mining, Smelting & Manufacturing Co. Ltd. v. Attorney-General for Ontario* (1932), 41 O.W.N. 14 at 15, that the issuance of a writ is ordinarily a matter of right and that there is no power *under the Rules* to dismiss or stay an action on the ground that the endorsement of a writ shows no reasonable cause of action (the italics are my own). I think that, therefore, I must dispose of this basis of the application on the short ground that at this stage of the action, *i.e.*, upon issuance of the writ alone, and without pleadings, the very words of Rule 124 do not permit me to stay the action.

The basis for the allegation that the action should be stayed as frivolous and vexatious is twofold: Firstly, it is argued that in view of ss. 68 and 69 of The Labour Relations Act, the endorsement on the writ can be considered to be vain and therefore frivolous and vexatious. It has been said in many cases that if a pleading raises important questions of law, the pleading should not be stricken out upon an application under the provisions of Rule 124 or its English counterpart, Order 25, rule 4: *Electrical Development Co. of Ontario Limited v. Commissioners for Queen Victoria Niagara Falls Park* (1917), 40 O.L.R. 460, per Latchford C.J. at p. 481; *Electrical Development Company of Ontario v. Attorney-General for Ontario et al.*, [1919] A.C. 687, 47 D.L.R. 10; *Wright v. Prescott Urban Council* (1916), 86 L.J. Ch. 221. It is difficult to distinguish between these cases and the series of cases in which pleadings have been stricken out with a pronouncement upon an important principle of law: *Chatterton v. Secretary of State for India*, [1895] 2 Q.B. 189, where a strong Court composed of Esher M.R. and Kay and A. L. Smith L.J.J. stayed an action for an alleged libel contained in a communication from one officer of state to another on the ground that such communications were the subject of absolute privilege; *Salaman v. Secretary of State for India*, [1906] 1 K.B. 613, where the Court of Appeal (Vaughan

Williams and Sterling L.JJ., Fletcher Moulton L.J. dissenting) stayed an action for arrears of pension by a former maharajah, holding it was an attempt to attack an act of state; *Hubbuck & Sons, Limited v. Wilkinson, Heywood & Clark, Limited*, [1899] 1 Q.B. 86, where the Court of Appeal stayed an action by a judgment given by Lindley M.R. upon the ground that the statement complained of, even if untrue, was not actionable under the law of libel. I am rather of the opinion that, relying on this latter series of cases, I might be justified in staying the action on the ground that it was frivolous and vexatious as being directly prohibited by ss. 68 and 69 aforesaid, but I prefer to rest my decision on the basis which I shall hereinafter outline.

The second ground upon which it is alleged that the action is frivolous and vexatious is that the plaintiff has chosen to assert its claim for relief in a writ in a High Court action rather than by the well-established and expeditious method of application for prohibition and certiorari. Rule 622 provides: "Mandamus prohibition and *certiorari* may be granted upon a summary application by originating notice." The endorsement of the writ of summons is for four declarations and for an injunction restraining the defendant from proceeding further with a petition for certification or from hearing or entertaining any further petition under the circumstances. Counsel for the defendant, as applicant herein, alleges that the declarations asked for are merely ancillary to the grant of an injunction and that the prayer for an injunction, being in essence a claim that the Ontario Labour Relations Board should be restrained in the exercise of its judicial or semi-judicial functions, is a claim for relief which should be put forward in the form of an application for prohibition and certiorari rather than in the form of a writ in the High Court for the injunction. Counsel for the applicant stresses that the Ontario Labour Relations Board is a full-time board sitting almost continuously, with a staff and with a procedure designed to deal expeditiously with the complicated problem of labour relations, and to permit this action to proceed through pleadings to trial would delay the due process of the Board and very deleteriously affect the efficient management of labour relations in the Province. Counsel further stresses that if one company is able to paralyze the adjustment of its labour relations by taking this long process rather than the

expeditious one permitted by the Rules, then others, unhappy at the decisions of the Board, will be moved to follow its example and the result might well be a paralysis in the adjustment of labour relations in the Province. Such a dangerous tendency was cited by the Court as a ground for staying an action in *Harris v. Jose* (1866), 13 L.T. 699 at 701. Therefore counsel alleges that the issuance of the writ is frivolous and vexatious. It is my purpose to review this ground when dealing with the application based on the submission that the issuance of the writ is an abuse of the process of the Court and that the action should be stayed under the inherent powers vested in the Court.

That such jurisdiction exists, altogether apart from the provisions of Rule 124 or its English counterpart, seems to be abundantly clear. In many cases the Courts have referred to the inherent jurisdiction and have distinguished it from the provisions of the rules. In *Haggard v. Pélicier Frères*, [1892] A.C. 61 at 67-8, Lord Watson said: "Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, without proof, actions which it holds to be vexatious." He also quoted the Earl of Selbourne L.C. in *The Metropolitan Bank Limited et al. v. Pooley* (1885), 10 App. Cas. 214. I refer also to *Kellaway v. Bury* (1892), 66 L.T. 599, per Kay L.J. at 602, and *In re Norton's Settlement; Norton v. Norton*, [1908] 1 Ch. 471, where at p. 482 Farwell L.J. states: "The point as to the action being frivolous and vexatious has not been urged in this Court, but the application to stay is based on the ground that, *on the assumption that there is a proper cause of action*, the action is an abuse of the process of the Court." (The italics are my own.)

In *O'Connor v. Waldron*, 65 O.L.R. 407, [1930] 4 D.L.R. 22, Orde J.A. at p. 409, in striking out a writ, stated that he acted not only under the latter part of the Rule (124) but under the inherent jurisdiction of the Court. The judgment of Orde J.A. was affirmed [1931] O.R. 608, [1931] 4 D.L.R. 147, 56 C.C.C. 296; [1932] S.C.R. 183, [1932] 1 D.L.R. 166, 57 C.C.C. 268, which was reversed on other grounds, [1935] A.C. 76, [1935] 1 D.L.R. 260, [1935] 1 W.W.R. 1, 63 C.C.C. 1.

In *Rex ex rel. Tolfree v. Clark et al.*, [1943] O.R. 319, [1943] 2 D.L.R. 554, affirmed [1943] O.R. 501, [1943] 3 D.L.R. 684, Hope J. said at p. 329: "Quite aside from the jurisdiction con-

ferred by Rule 124, the Court is possessed of inherent jurisdiction to stay proceedings on the ground that the case discloses no reasonable cause of action."

I am of the opinion that Riddell J. (as he was then) when he stated in *Orpen v. Attorney-General for Ontario*, 56 O.L.R. 327 at 332, [1925] 2 D.L.R. 366, varied 56 O.L.R. 330, [1925] 3 D.L.R. 301: "The power left in the Court by the Ontario Judicature Act . . . and asserted by Rule 124, of staying or dismissing any action which is plainly frivolous or vexatious or which discloses no reasonable cause of action, is simply that inherently possessed by the Court to prevent abuse of its process", cannot be taken as having decided that Rule 124 had the effect of excluding any part of the inherent jurisdiction exercised by the Court up to the time of the enactment of the Rules and not included in the wording of the said Rule 124.

The question to be determined is whether the issuance of the writ, rather than an application for certiorari and prohibition, is such an abuse of the process of the Court as to justify staying the action. Certainly certiorari does lie against administrative tribunals when they are exercising judicial or semi-judicial functions: *Re Kendrick and The Milk Control Board of Ontario*, [1935] O.R. 308 at 310, [1935] 3 D.L.R. 198, 63 C.C.C. 385, per Middleton J.A., although when discharging a purely administrative function a Crown officer cannot be controlled by certiorari: *Re Imperial Tobacco Co. Ltd. et al. and McGregor*, [1939] O.R. 213, [1939] 3 D.L.R. 750 (*sub nom. Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.*), affirmed [1939] O.R. 627, [1939] 4 D.L.R. 99, 72 C.C.C. 321; *Re Brown and Brock and the Rentals Administrator*, [1945] O.R. 554, [1945] 3 D.L.R. 324.

Counsel for the plaintiff submits that certiorari and prohibition may be claimed alternatively by writ of summons or by application under Rule 622 and reads that Rule, which deals in exactly the same manner with the three remedies, mandamus, certiorari and prohibition, and he cites Middleton J.A. in *The Commodore Grill v. The Town of Dunnville*, [1941] O.W.N. 384, [1941] 4 D.L.R. 708, where the Court of Appeal reversed the judge of first instance who had stayed an action commenced by writ of summons for mandamus, on the ground that the issuance of a writ or an originating application under Rule 622 were alternative procedures for claiming the remedy and that there-

fore the use of one procedure rather than the other was not an abuse of the process of the Court. It is to be noted that in that case the writ was for mandamus only and certiorari and prohibition were not in any way involved. Some considerable research has revealed to me no case where the issuance of a writ for certiorari and prohibition has been approved by the Courts. I subscribe to the statement made by MacDonald J. in *Credit Foncier Franco-Canadien v. Board of Review under Farmers' Creditors Arrangement Act, 1934, et al.*, [1939] 3 W.W.R. 632 at 635-6, [1940] 1 D.L.R. 182, 21 C.B.R. 166: "But the most diligent search I could make has failed to find any case in which *certiorari* was held to be alternative to an action." In *Attorney-General v. Guardians of the Poor of the Merthyr Tydfil Union*, [1900] 1 Ch. 516, an injunction was granted restraining the guardians from misapplying funds, but solely on the basis that certiorari would not be an effective remedy, and the Court distinguished the two cases *Grand Junction Waterworks Company v. Hampton Urban District Council*, [1898] 2 Ch. 331, and *Barraclough v. Brown et al.*, [1897] A.C. 615, on the ground that in both of these cases an adequate remedy was available to be pursued in an appropriate forum. In *Stannard v. Vestry of St. Giles, Camberwell* (1882), 20 Ch. D. 190, Jessel M.R. at p. 197 said: "It is a mere case of prohibition, and there is no reason for changing the mode of proceeding from prohibition to injunction where you are not compelled to decide the question on other grounds between the same parties".

The respondent further objects that the claim in a writ for a declaration that the agreement between the respondent and the Hollinger Bus Lines Employees' Association dated 28th September 1950 was merely an amendment of a previous agreement between the same parties, dated 13th December 1949, and therefore not subject to the provisions of the 1950 statutes, can only be determined at a trial upon *viva voce* evidence. If the respondent were to apply for certiorari or prohibition in the usual fashion as provided by Rule 622, and in the determination of such application it became necessary to make any finding of fact, and for such purpose to hear *viva voce* evidence, then provision is made for such a course in the ordinary procedure of the Court: see Rules 229 and 233. Moreover, as counsel for the applicant points out, the issue upon an application for certiorari

and prohibition would be a simple one, "Did the Board act beyond its jurisdiction?", and an affirmative answer to that question would afford complete relief to the respondent.

I have therefore come to the conclusion that the relief claimed by the respondent, in so far as its request for an injunction is concerned, may be asserted in an application for certiorari and prohibition and that an alternative method of asserting that right by the issuance of a writ does not exist. Moreover, I am convinced that the initiation of the slower and less summary method of the trial of an action, with its possibly very serious consequences in the administration of the labour relations in this and other industries, does, under the circumstances, constitute an abuse of the process of the Court which the Court should prevent. It would seem akin to "real injustice to the other litigant": per Vaughan Williams L.J. in *In re Norton's Settlement; Norton v. Norton*, *supra*, at p. 482, and "for the purpose of harassing and annoying the defendant, and obtaining something to which the plaintiff may not in justice, be entitled": per Farwell L.J. at p. 484. The "something to which the plaintiff may not in justice be entitled" in the present case is the well-nigh intolerable delay caused by trial in the ordinary course.

It remains to be considered whether the plaintiff is entitled to maintain its action for the declaration asked in the writ altogether apart from the injunction. The right to obtain a declaratory judgment under proper circumstances even against the Crown is well established: *Dyson v. Attorney-General*, [1911] 1 K.B. 410.

In *Gruen Watch Company of Canada Limited et al. v. The Attorney-General of Canada*, [1950] O.R. 429, [1950] 4 D.L.R. 156, (see on appeal *sub nom. Bulova Watch Company Limited v. The Attorney-General of Canada*, [1951] O.R. 360, [1951] 3 D.L.R. 18), McRuer C.J.H.C. said at p. 445: "But a declaratory judgment where no incidental relief is sought [and here upon my conclusion above no incidental relief can be obtained by action] is not a judgment which is given as of right in all cases where the circumstances might warrant it. It is a judgment given in the exercise of a judicial discretion."

It has been said in many cases that the Courts will not grant such a declaratory judgment loosely, and will only so act when no other efficient remedy is available: *Baxter v. London County*

Council (1890), 63 L.T. 767; *Smeeton v. Attorney-General*, [1920] 1 Ch. 85; *Attorney-General for Ontario v. Canadian Wholesale Grocers Association*, 53 O.L.R. 627, [1923] 2 D.L.R. 617, 39 C.C.C. 72, particularly per Ferguson J.A. at p. 664; *Cassidy v. Stuart*, 62 O.L.R. 374, [1928] 3 D.L.R. 879, where Masten J.A. said at p. 379 that the Court would not grant such a declaratory judgment when by doing so it usurped the jurisdiction given by legislative provision to another forum.

See also *Barraclough v. Brown et al.*, *supra*; *Grand Junction Waterworks Company v. Hampton Urban District Council*, *supra*; *Mutrie v. Alexander* (1911), 23 O.L.R. 396, per Middleton J. (as he then was) at p. 401: "But a far more serious difficulty in the plaintiff's way is this. The High Court, under the guise of a declaratory decree, must not usurp the jurisdiction conferred by the Legislature upon another tribunal." *The City of Lethbridge v. The Canadian Western Natural Gas Light, Heat and Power Co., Ltd.*, [1923] S.C.R. 652, [1923] 4 D.L.R. 1055, [1923] 3 W.W.R. 976, per Anglin J. (as he then was) at p. 659.

Lord Buckley in *Guaranty Trust Company of New York v. Hannay & Company*, [1915] 2 K.B. 536, pointed out that the judges in *Dyson v. Attorney-General*, *supra*, relied heavily on the threat of penalties as a material element in moving them to grant the declaration and the same element of threatened administrative action was considered by both McRuer C.J.H.C. and the Court of Appeal in *Gruen Watch Company of Canada Limited et al. v. The Attorney-General of Canada*, *supra*. Moreover in both of these cases the Court was considering acts by Crown officials which were administrative only in character and not even semi-judicial. Under these circumstances certiorari did not lie. In this case in my opinion the acts and decisions of the Board are semi-judicial in character and therefore certiorari will lie if these acts are beyond the jurisdiction of the Board.

Under such circumstances, in my opinion, a declaration without any incidental relief would be a declaration "in the air": *Attorney-General et al. v. Scott*, [1905] 2 K.B. 160. I therefore have concluded that the respondent's right to maintain the action is not preserved by the claims for declarations and that such declarations are not justified under s. 15(b) of The Judicature Act, R.S.O. 1950 c. 190.

Therefore the application of the Ontario Labour Relations Board is granted with costs. The action will be stayed.

Action stayed.

Solicitors for the plaintiff: Shaver, Paulin & Branscombe, Toronto.

Solicitor for the defendant: E. H. Silk, Toronto.

[McRUER C.J.H.C.]

Re Carriere et al. and The United Counties of Prescott and Russell.

Municipal Corporations — Creation — Erection of Village — Conclusiveness of Clerk's Certification of Petition — Subsequent Attempts to Withdraw Signatures — Counter-petition — The Municipal Act, R.S.O. 1950, c. 243, s. 12.

Persons who have signed a petition for the erection of a village under s. 12 of The Municipal Act may not withdraw their names from the petition after the clerk of the municipality has certified the petition under subs. 3 of s. 12, nor is the municipal council entitled, after such certification, to consider counter-petitions, or to do anything but pass the required by-law, provided the necessary steps as to publication, etc., have been taken. The Legislature has conferred upon the clerk an administrative function, and when he has determined the sufficiency of the petition and given a certificate, that certificate is final and his findings cannot be reviewed. *Halladay v. The City of Ottawa* (1907), 14 O.L.R. 458, affirmed 15 O.L.R. 65; *Re Keeling and Township of Brant* (1911), 25 O.L.R. 181, considered.

AN APPLICATION for a mandamus.

2nd June 1951. The application was heard by McRUER C.J. H.C. in chambers at Ottawa.

O. H. Chartrand, for the applicants.

W. R. Hall, K.C., for the United Counties of Prescott and Russell.

H. Saint-Jacques, K.C., for the counter-petitioners.

28th June 1951. McRUER C.J.H.C.:—This is an application for an order of mandamus requiring the corporation and the council of the United Counties of Prescott and Russell to pass a by-law at the next sitting of council, erecting the police village of Alfred into a village of Alfred, pursuant to the provisions of The Municipal Act, R.S.O. 1950, c. 243.

Section 12 of the Act provides the procedure to be followed where it is desired to erect a district within a municipality into

a village. The procedure is as follows: In cases such as the one I have under consideration, under subs. 1 there must be a petition signed "by at least one-half of the freeholders representing at least one-half of the assessed value of the lands in the district and resident tenants of the district whose names are entered on the last revised assessment roll of the municipality in which the district is situate, and in the case of tenants who have been resident in the district for at least four months next preceding the presentation of the petition, all of the petitioners being British subjects of the full age of 21 years, and at least one-half of them freeholders, praying for the erection of the district into a village". The petition must be presented to the council, and the council, if the district has a population exceeding 750, "shall within three months after the presentation of the petition pass a by-law erecting the district into a village, declaring the name which it shall bear and its boundaries".

Subsection 2 sets out what must be shown in the petition, including whether the petitioner is a freeholder or a resident tenant.

Subsections 3, 4, 5 and 6 in my view are decisive of the issues argued before me. They read as follows:

"(3) A petition shall be deemed to be presented when it is lodged with the clerk, and the sufficiency of the petition shall be determined by him and his certificate shall be conclusive in reference thereto.

"(4) The number of the inhabitants of the district shall be ascertained by a special census taken by direction of the council.

"(5) The by-law shall not be passed before the expiration of one month after the presentation of the petition, nor until further notice has been given of the meeting of the council at which it is intended to take it into consideration.

"(6) The notice shall be published at least once a week for two successive weeks during the two months next preceding the meeting and shall contain a description of the district sufficiently full to indicate the land which it is intended to embrace in the proposed village."

It was admitted in argument, and on the material it cannot be challenged, that a properly-signed petition was lodged with the clerk of the municipality on 13th December 1950, and that he proceeded in a regular manner according to the provisions

of the statute to ascertain the sufficiency of the petition, and issued his certificate pursuant to the provisions of subs. 3 of s. 12. After the clerk had issued his certificate the proper statutory notices were published. Following the publication of these notices two petitions were lodged with the clerk of the municipality on 16th April 1951, purporting to be signed by residents of the area.

One petition, said to be signed by 57 parties, states as follows: "Nous avons signé une pétition demandant l'incorporation d'Alfred comme village. Nous déclarons ne pas avoir compris toute l'étendue de la pétition et demandons au conseil de biffer notre nom de la dite pétition." ("We have signed a petition requesting the incorporation of Alfred as a village. We state that we did not understand the extent of the petition and request the council to strike our names from the said petition.")

The other petition, said to be signed by 78 persons, opposes the incorporation of the village. Neither of these petitions conforms to subs. 2 of s. 12 with respect to the information that is required to be set out in a petition under that subsection.

According to the material filed, of the 96 freeholders who appear to have signed these two petitions, 38 were among the freeholders who signed the original petition lodged with the clerk on 13th December 1950, and of the 33 qualified resident tenants who appear to have signed the second petition, 21 were among the qualified resident tenants who signed the original petition. If the names of those who asked to withdraw their names from the original petition were stricken from it, the names of one-half of the freeholders of the district would still remain on the petition, but they would not represent one-half of the assessed value of the lands in the district.

On receiving the two petitions that were lodged on 16th April the council declined to pass the by-law erecting the district into a village.

Mr. Chartrand argues that the procedure laid down by s. 12 of The Municipal Act was followed in every detail and, the clerk having issued his certificate pursuant to subs. 3, the council had no right to consider any further representations and was bound to pass the by-law. With this argument I agree.

The Legislature has seen fit to confer on the clerk an administrative function. He proceeded regularly to determine

the sufficiency of the petition and in my opinion under subs. 3 of s. 12 his certificate was final. I do not think it was open to the council to review his findings and consider the counter-petitions in which certain parties who had signed the first petition asked that their names be withdrawn or struck from the petition. There is no procedure under The Municipal Act authorizing such a course.

Several authorities were quoted to me on the argument, but each case must be considered in the light of the express terms of the statute there applicable.

In *Halladay v. The City of Ottawa* (1907), 14 O.L.R. 458, Britton J. made an order quashing a by-law for the early closing of grocery shops. The application was based on the submission that a number of names in the petition were not of the requisite class and that after striking off such names there was not remaining the three-fourths required by the Act, and on the further ground that before the passing of the by-law certain petitioners had withdrawn their names so that at the time of its passing the remaining names in favour of it did not represent three-fourths of the occupants doing business as grocers in Ottawa (a condition precedent to the passing of the by-law). In referring to those who had withdrawn their names, Britton J. stated at p. 460: "If these persons who had changed their minds had the right to do so before the council assumed to act, then there was not before the council the properly signed petition or application when the by-law was even read a first time, or when the by-law was finally passed." The learned judge recognized the right of a petitioner to withdraw his name before the by-law was passed.

An appeal was taken to the Court of Appeal, *Re Halladay and City of Ottawa* (1907), 15 O.L.R. 65. The judgment of the Court of Appeal makes clear the distinction between the case there being considered and the one before me. The statute there in question was s. 44 of R.S.O. 1897, c. 257, which contained the following language: "If the council is satisfied that the application is signed by not less than three-fourths in number, the by-law shall be passed."

What happened was that the clerk of the municipal council conducted an investigation and satisfied himself with reference

to the sufficiency of the petition. At p. 66 Meredith C.J.C.P. stated:

"It seems to me that there was here a complete delegation by the council to the clerk of the duty of ascertaining whether this petition was properly signed.

"I do not say that if what they had done was to refer the matter to the clerk to report as to the facts, and he had reported the evidence to the council, and they had then upon that report exercised their judgment as to whether the petition was sufficiently signed, that might not have sufficed; but apparently what they did was not to exercise any judgment at all, but to take the judgment of the clerk."

This case would appear to make it clear that in the opinion of the Court of Appeal, if the Legislature had conferred on the clerk the exclusive jurisdiction to make a finding as to the sufficiency of the petition, his certificate would have been final. But the council was the body that had the sole jurisdiction to make a decision as to the sufficiency of the petition, and until that decision was made any petitioner had the right to withdraw his name.

A case that is not dissimilar from the one before me was considered by Sutherland J. in *Re Keeling and Township of Brant* (1911), 25 O.L.R. 181. That was a case under The Liquor License Act, R.S.O. 1897, c. 245, s. 141, as amended by 1906, c. 47, s. 24, and 1907, c. 46 s. 11. The statute provided:

"In case a petition in writing signed by at least twenty-five per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections, is filed with the clerk of the municipality on or before the 1st day of November next preceding the day upon which such poll would be held, praying for the submission of such by-law, it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

A petition signed by the required 25 per cent. was filed with the clerk of the municipality on or before 1st November. After that date a counter-petition was filed containing the signatures of 16 persons who had signed the original petition, requesting that their names should be withdrawn from the petition, and another petitioner appeared at the meeting of the council and

requested the withdrawal of his name. With the subtraction of the 17 petitioners from the total number signing, the net number of petitioners was less than the 25 per cent. required by the Act. The council refused to submit the petition.

Sutherland J. considered *Halladay v. The City of Ottawa, supra*, and other cases and held that on 1st November a petition in writing signed by the required 25 per cent. was filed with the clerk and it was not open to any who signed the petition to change their minds after the date fixed for filing the petition. He stated at p. 188: "Here, those desiring the by-law to be passed had secured more than the necessary number of qualified electors before the fixed date in the year mentioned in the statute. Possibly they could have obtained more signatures to it, if they had thought there was any danger of such a thing occurring as has occurred. They cannot now, after the date so fixed by statute for filing it with the clerk, obtain further signatures to the petition sufficient in number to legalise it. They would, therefore, be compelled to wait another year before having the matter dealt with. I cannot think it was so intended." A mandatory order was issued accordingly.

I think the principle to be applied in deciding the case before me may be stated thus: A petitioner in such case has a right to withdraw his name from the petition before the body having jurisdiction to decide as to the sufficiency of the petition has acted (unless the sufficiency of the petition is to be determined as of a certain date as in the *Keeling* case). If the body having jurisdiction to decide the sufficiency of the petition has acted the petitioner has no right to withdraw his name.

Applying this principle to the case before me, I do not think that under s. 12 of The Municipal Act there is any jurisdiction in the council to entertain applications to withdraw from the original petition after the clerk has given his certificate under subs. 3. If it were seriously contended that the certificate had been obtained by fraud, proceedings might have been taken to set it aside, but I do not think it was within the contemplation of the Legislature that the council should be obliged to, or have jurisdiction to, consider petitions and counter-petitions *ad infinitum* after the sufficiency of the petition had been determined by the municipal clerk. The language of s. 12(3) is explicit and the council, having before it the certificate of the

clerk, was then obliged to proceed as required by statute and pass the by-law. An order for mandamus will therefore go.

While I allowed Mr. Saint-Jacques, who appeared on behalf of the counter-petitioners, to be heard, in view of the fact that they were not made parties to the notice of motion I can make no order as to costs against his clients. The applicants will have their costs against the municipal corporation.

Order made.

Solicitor for the applicants: Omer H. Chartrand, Hawkesbury.

Solicitor for the United Counties of Prescott and Russell: W. R. Hall, Vankleek Hill.

Solicitor for the counter-petitioners: Henri Saint-Jacques, Ottawa.

[LEBEL J.]

D. M. Duncan Machinery Company Limited v. Canadian National Railway Company et al.

Sale of Goods — Liability for Injury to Goods — Shipment by Seller without Instructions from Buyer — Seller as Bailee — Negligence in Packing — Delivery to Carrier — The Sale of Goods Act, R.S.O. 1950, c. 345, ss. 21, 31(2).

Bailment — Liability of Bailee — Goods in Seller's Custody after Sale — Shipment by Seller — Negligence in Packing — Passing of Property.

A contract for the sale of machinery contained the words: "Customer to advise shipping instructions." The contract also contained clauses whereby the buyer was required to remove the goods or furnish shipping instructions within a stated time, and if this was not done the seller was entitled to cancel the contract or require payment of storage charges. No shipping instructions were given, but the seller shipped the machinery to the buyer's place of business, where it arrived so damaged that it was useless except as scrap metal. It was found on the evidence that the damage to the machinery was the result of inadequate preparation for shipping.

Held, the seller was liable to the buyer for the value of the machine, together with the expense involved in the shipment, but was entitled to credit on the judgment for any amount realized from the sale of the machinery as scrap metal. Although the property had passed, and the goods were at the buyer's risk at common law (*Martineau et al. v. Kitching* (1872), L.R. 7 Q.B. 436 at 454-5, quoted and applied), this rule, as embodied in s. 21 of The Sale of Goods Act, was subject to two provisos, one of which was that the section did not affect the duties or liabilities of either seller or buyer as bailee. The seller, after the sale, was in the position of a bailee, and it was unnecessary to decide whether in the circumstances it was a bailee for reward or a gratuitous bailee, since in either case it would be liable for

negligence. *Giblin v. McMullen* (1868), L.R. 2 P.C. 317; *Munn v. Wakelin* (1944), 17 M.P.R. 447, applied. Further, the seller was not bound by the contract to ship when it did and even if it was a gratuitous bailee it was well established that having entered upon the performance of that undertaking it was liable for negligence therein. *Baxter & Co. v. Jones* (1903), 6 O.L.R. 360 at 364; *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, applied. The failure to prepare the machine properly for shipment was clearly negligence, and the seller was also guilty of a breach of its duty under s. 31(2) of the Act.

The seller was not relieved by a condition in the contract providing that it would not be liable "for loss, damage or destruction from any cause whatsoever of the property sold". If this condition was intended to relieve the seller from liability for loss resulting from the negligent performance of its duties under the contract, the answer was that when the seller undertook to ship the goods to a destination of its own choice it was acting outside the contract, and therefore could not rely upon the terms and conditions of the contract as a defence. *Jones v. Gibbons* (1853), 8 Exch. 920, applied.

The carriers who transported the machinery were not liable to the buyer, since they had no knowledge that the machinery had not been properly prepared for shipping, and there was no duty on them as carriers to inspect it. *London and North Western Railway Company v. Richard Hudson and Sons, Limited*, [1920] A.C. 324, quoted and applied. The defence of bad packing would have been open to the carriers even if they had carried the goods with full knowledge of their condition. *Gould v. South Eastern and Chatham Railway Company*, [1920] 2 K.B. 186 at 190-1, applied.

AN ACTION for damages. The defendants were Canadian National Railway Company, War Assets Corporation and Hendrie & Company Limited.

9th to 11th April 1951. The action was tried by LEBEL J. without a jury at Windsor.

B. J. S. Macdonald, K.C., for the plaintiff.

W. R. Burnett, for the defendant Canadian National Railway Company.

A. F. Gignac, for the defendant War Assets Corporation.

D. I. W. Bruce, for the defendant Hendrie & Company Limited.

4th July 1951. LEBEL J.:—On 21st July 1947 the plaintiff, a dealer in machinery with a place of business at Ojibway, purchased from the defendant War Assets Corporation a used piece of machinery called a Natco Holesteel drill. It was then in one of the seller's warehouses at Toronto. By the contract of sale the machine was said to be in good condition and it was sold "as is, where is", meaning where it stood and in the condition it was in at the time. The document was silent as to the point to which it was to be shipped, but these words appeared: "Customer to advise shipping instructions." It was understood that the machine was purchased for resale and hence that the plaintiff might direct that it be shipped anywhere. The machine was

inspected by the plaintiff's manager and it was paid for later when it was purchased. On 20th August, upon its arrival by rail at Ojibway, it was found to be damaged beyond repair and to be valueless except for scrap. The plaintiff now sues the defendants for damages and includes a claim for loss of profit upon the basis of the anticipated resale of the machine. The defendant Hendrie & Company Limited is the public carrier who moved the machine from War Assets Corporation's warehouse and the defendant Canadian National Railway Company is the railway company which transported it from Toronto to Ojibway. These two defendants I shall refer to as "the cartage company" and "the railway company" respectively. When I speak of "the Corporation" I shall be understood to refer to the defendant War Assets Corporation.

It seems clear from the provision in the contract concerning shipping instructions that the Corporation impliedly bound itself to retain possession of the machine until the plaintiff company's wishes were known and to ship it at that time. However, by conditions 3 and 5, to which the contract was subject, the plaintiff was required to remove it or furnish shipping instructions within a certain period of time. If it failed to do either, the Corporation was entitled, "without prejudice to any other remedies which it may have, [to] cancel the contract or require the payment of storage charges on the property".

Considerable time was devoted at the trial to the question whether or not the plaintiff gave instructions to ship the machine to Ojibway. The only possible conclusion upon the evidence upon this point is that none were given, and I so find. The Corporation called no one to say they had received any, and though records of earlier instructions covering other machines were said to have been found, none could be produced with respect to this machine. Furthermore, the servant of the Corporation who was identified by name as the person who gave the order for the removal of the machine from the Corporation's warehouse, was not called to testify, and the plaintiff's officers who appeared before me swore that neither had they any record of, nor could they recall giving, any instructions for moving this machine. Unquestionably what happened was that, not having heard from the plaintiff within the time specified in the contract, the Corporation decided not to cancel the contract or

notify the plaintiff that they would hold it subject to storage charges. Instead it must have been decided to ship the machine to the plaintiff's place of business—no doubt to be rid of it.

Mr. Leslie S. McGregor, a mechanical engineer in the railway company's employ, gave it as his opinion, which I accept, that the damage to the machine occurred in the course of transit by rail between Toronto and Ojibway. He said that the damage was caused by the failure to secure or immobilize a heavy counterweight within the column of the machine. That resulted, he said, in the column being struck repeatedly by the counterweight and eventually broken. There is no other acceptable theory in evidence and the condition of the machine when it reached Ojibway bears out Mr. McGregor's opinion. Upon the facts, the damage could have been done only in the way he described, for nothing indicates that it occurred from the time the machine was loaded into the cartage company's motor trailer at the Corporation's warehouse until it was bolted and otherwise supported upon the railway company's flat car at one of its Toronto loading-platforms. If the plaintiff is to succeed, therefore, it must do so upon the ground that failure on the part of one or all of the defendants to prepare the machine properly for shipment was negligence in the circumstances, and I think it was.

The counterweight, which weighed about 6,200 pounds, could have been secured by a bar extending through holes on opposite sides of the column, provided by the manufacturers for that purpose, or it could have been made fast by blocks properly placed within the column itself, and in other ways. The plaintiff had some time earlier purchased from the Corporation eight drills similar to, or very much like, the one with which I am now concerned and in each case the counterweight had been found to be secured upon its arrival at its destination. That those who handled these machines thus knew that it was necessary to secure the counterweight is abundantly plain; and it was also in evidence, and not denied, that anyone with even a superficial knowledge of machinery would know that that precaution was necessary. In my opinion to have failed to secure the counterweight by some such method as I have mentioned and to have thus allowed it to remain in suspension during transit by rail was negligent in the extreme.

The defendants' main contention is that they owed no duty to the plaintiff to secure the counterweight. On this branch of the argument it was submitted by counsel for the Corporation that the property in the machine passed to the plaintiff upon its purchase and that the risk of the loss was afterwards in the purchaser. It was, it was said, for the plaintiff to look to the protection of its own property. I shall deal first with that submission.

At common law, unless otherwise agreed, the property in the machine passed to the plaintiff upon receipt of payment therefor, for "when you can shew that the property passed the risk of the loss, *primâ facie* is in the person in whom the property is"; per Blackburn J. in *Martineau et al v. Kitching* (1872), L.R. 7 Q.B. 436 at 454. This principle is to be found in s. 21 of The Sale of Goods Act, R.S.O. 1950, c. 345; and it is subject to two provisos. The section reads:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not, provided,

"(a) that where delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault;

"(b) that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party."

While there was delay in delivery through the fault of the plaintiff company, the loss did not occur on that account. In the language of clause *a* it was not a "loss which might not have occurred but for such fault". Clearly, the failure to give shipping instructions is in no way related to the failure to secure the counterweight, and the contention that the plaintiff's manager should have observed the state of the counterweight does not assist the Corporation, since the plaintiff could not be expected to know that the machine would be shipped without instructions. The plaintiff was not afforded a chance to say anything as to the necessity for securing the counterweight, if in fact the plaintiff's manager had noticed that this precaution

had not been taken at the time of his inspection, and I find that he did not.

Clause *b* does no more than preserve “the duties or liabilities of either seller or buyer as a bailee”, and it is therefore necessary to consider the law of bailment.

In 29 Halsbury, 2nd ed. 1938, at p. 102, it is said that: “A seller in possession of the buyer’s goods is in respect thereof probably subject to the obligations of a bailee for reward until the expiration of the time expressly or by implication appointed for the buyer to take delivery. After the expiration of that time the seller is probably subject to the obligations of a gratuitous bailee.” I accept this passage as declaratory of the law.

In my opinion, it is unnecessary to decide whether the Corporation was at the material time a bailee for reward or a gratuitous bailee. In either case it would be liable for failing to exercise reasonable care, skill and diligence: Beal’s Law of Bailment, 1900, pp. 22-3; *Giblin v. McMullen* (1868), L.R. 2 P.C. 317; *Munn v. Wakelin* (1944), 17 M.P.R. 447; *Palin v. Reid* (1884), 10 O.A.R. 63. Moreover, and in any event, the Corporation was not bound by the terms of the contract to ship as it did, and if in the circumstances it is to be regarded merely as a gratuitous bailee, “it is well established that one who enters upon the performance of a mandate or gratuitous undertaking on behalf of another, is responsible not only for what he does, but for what he leaves unfulfilled . . .”: *Baxter & Co. v. Jones* (1903), 6 O.L.R. 360 at 364, following *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, 93 E.R. 107. And see *Wills v. Browne* (1912), 3 O.W.N. 580, 20 O.W.R. 880, 1 D.L.R. 388; *The Canadian Gas Power & Launches, Ltd. v. Crosby* (1910), 44 N.S.R. 192, 8 E.L.R. 10; *Ferguson v. Eyer* (1918), 43 O.L.R. 190 at 204, and 1 C.E.D. (Ont.), 2nd ed. 1949, pp. 420-1.

I am satisfied that in failing to secure the counterweight the Corporation was negligent. Moreover, it was the Corporation’s duty to see to it, “having regard to the nature of” the machine, that its co-defendants, or either of them, took such steps as were necessary to protect the machine, and this it failed to do. Section 31(2) of The Sale of Goods Act, provides: “Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circum-

stances of the case, and if the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."

As another defence, the Corporation relies upon the eighth condition to which the contract was made subject. It reads:

"8. War Assets Corporation will not be liable for loss, damage or destruction from any cause whatsoever of the property sold; but should any of such property be lost or destroyed during the period allowed for removal and prior to the actual removal or shipment thereof, War Assets Corporation will refund to the purchaser any moneys paid as the price of or otherwise on account of the property so lost or destroyed."

If this means that this condition relieves the Corporation from liability for loss resulting from the negligent performance of its contractual obligations, as was contended for, the short answer is that when the Corporation undertook to ship the machine to a destination of its own choice, it was clearly acting outside the contract. In such circumstances it cannot rely upon the terms and conditions of the contract as a defence. Having decided neither to cancel the contract nor to claim storage charges, the Corporation should have made a demand for instructions. It was not entitled, in my opinion, to ship the machine until it had received instructions: *Jones v. Gibbons* (1853), 8 Exch. 920, 155 E.R. 1626.

Before proceeding to discuss the question of damages I propose to deal briefly with the case against the railway and cartage companies. It is clear upon the evidence that neither company's servants knew that the counterweight had not been secured. Nothing during the course of loading or transporting the machine brought this fact to their attention, and there was no duty in law upon them as common carriers to inspect it in order to ascertain whether it had been properly prepared for shipment. The law upon this aspect of the case was reviewed and stated by Viscount Haldane in *London and North Western Railway Company v. Richard Hudson and Sons, Limited*, [1920] A.C. 324 at 331-2, to be:

"As was pointed out by Willes J. in *Blower v. Great Western Ry. Co.* (1872), L.R. 7 C.P. 655, 662, 663, the liability of a rail-

way company as a common carrier does not extend to damage consequential on an inherent 'vice' in the article carried. 'If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties.' That very learned judge quotes with approval the statement of the law in Story on Bailments where it is said: 'Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies; yet it is to be understood in all cases that the rule does not cover any losses not within the exception which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof.' Story goes on in the passage cited by Willes J. to give as an illustration the case of the goods 'not being properly put up and packed by the owner or shipper; for, the carrier's implied obligations do not extend to such cases.' "

In the same case Lord Dunedin, who disagreed with Viscount Haldane in the result, said at p. 335:

"I ought to add another remark. Undoubtedly, though a common carrier is an insurer, yet if the damage arises from inherent vice or from bad packing of the goods, the common carrier is not liable."

And the same principle applies in the case of bad packing even where the common carrier carries an article with full knowledge of its condition. The defence of bad packing is still open to the carrier in such circumstances: *Gould v. South Eastern and Chatham Railway Company*, [1920] 2 K.B. 186 at 190-1.

The action against these two defendants, therefore, fails and must be dismissed, and it is unnecessary to discuss the other defences raised by them.

As stated, the plaintiff claims damages for loss of profits on the basis of an anticipated resale, but its manager admitted that no resale had been concluded when the machine was shipped and

that there was no market for it. He stated the price at which he thought the machine might have been sold had it not been rendered useless, but that is not sufficient to support such a claim. The plaintiff also seeks to recover approximately \$400 for expenses to which it claimed to have been put by reason of its having taken or sent prospective purchasers to Toronto to see the machine, but I think such expenses are too remote. The plaintiff is, in my opinion, confined to such damages as flow directly from the Corporation's negligent preparation of the machine for shipment, *viz.*, the value of the machine together with the expense involved in its shipment. These I assess at \$1,050.78, including the value of the machine at the time of its purchase, *viz.*, \$800. The plaintiff must, however, credit upon its judgment such amount as it has been able, or is now able, to realize from the sale of the machine as scrap metal.

For these reasons, the plaintiff is entitled to judgment for \$1,050.78 and to costs against the Corporation, and the action against the other defendants is dismissed with costs.

In my opinion the plaintiff was justified in the circumstances in taking this action against all three defendants. Therefore, such costs as the plaintiff is required to pay to the other defendants may be recovered by the plaintiff from the Corporation.

Judgment accordingly.

Solicitors for the plaintiff: Wilson, Thomson & Macdonald, Windsor.

Solicitor for the defendant Canadian National Railway Company: W. R. Burnett, Toronto.

Solicitor for the defendant War Assets Corporation: A. F. Gignac, Windsor.

Solicitors for the defendant Hendrie & Company Limited: Smith, Rae, Greer, Sedgwick, Watson & Thom, Toronto.

[McRUER C.J.H.C.]

Robinson and Robinson v. The City of Cornwall.

Practice — Writ of Summons — Effect of Failure to Serve or Renew within Twelve Months — Extension of Time — Discretion of Court — Expiration of Limitation-Period — Plaintiff Lulled into Sense of Security — Rules 8, 176.

Rule 176, permitting the Court to enlarge or abridge the time prescribed by the Rules for doing any act, applies to an application under Rule 8 for an extension of time for renewing a writ of summons. Dictum of Middleton J.A. in *Prescott v. McArthur* (1928), 62 O.L.R. 385 at 387, not agreed with.

Although an extension of time for renewing a writ will not usually be granted after a statutory limitation period has run, there may be exceptional circumstances that will justify an extension even under those conditions. The obvious purpose of Rule 8 is that defendants should not be kept indefinitely unaware that an action has been commenced, and the purpose of a statute of limitations is that defendants are protected against the advancing of stale claims after the disappearance of evidence that might have been preserved. If neither of these factors is present, the importance of the requirements is lessened.

Notice of an accident was given to a municipality, and a writ was issued, both within the time prescribed by The Municipal Act. Negotiations took place between the plaintiffs' solicitor and an insurance adjuster representing the defendant, during the whole of which the solicitor was given to understand that liability was admitted and the action would be settled, and was expressly asked by the adjuster to withhold service of the writ pending negotiations for settlement. These negotiations continued up to the expiry of the twelve months' period following the issue of the writ, and the solicitor overlooked the ending of that period.

Held, in these special circumstances an extension of time for renewing the writ should be granted. The defendant had been promptly notified of the accident, and knew of the issue of the writ for months before it expired. The plaintiffs' solicitor had been lulled into a sense of security, the delay had been brought about by the defendant's agent, and in these circumstances the defendant was "disentitled to object to a renewal". *Battersby et al. v. Anglo-American Oil Company, Limited et al.*, [1945] K.B. 23 at 31, applied.

Travato v. Dominion Cannery Limited (1916), 35 O.L.R. 295; *Prescott v. McArthur*, *supra*; *Battersby et al. v. Anglo-American Oil Company, Limited*, *supra*; *Holman v. George Elliot and Company, Limited*, [1944] K.B. 591, and earlier authorities, considered.

AN APPEAL by the plaintiffs from an order of Marriott, Senior Master.

18th May 1951. The appeal was heard by McRUER C.J.H.C. in chambers at Toronto.

G. W. Mason, K.C., and J. S. Boeckh, for the plaintiffs, appellants.

W. Gibson Gray, for the defendant, respondent.

4th July 1951. McRUER C.J.H.C.:—This is an appeal from an order of the learned Senior Master dismissing an application for an order renewing the writ of summons herein, and allowing an application to set aside the service of the writ. The action

is brought to recover damages for injuries sustained by the female plaintiff by reason of falling on an icy sidewalk in the defendant municipality on the 21st November 1949. Notice of the claim was served on the municipal corporation on the 24th November 1949 and the writ of summons was issued on the 3rd February 1950, the statutory limitation for the service of the notice and the commencement of the action being fully complied with in each case.

The circumstances leading up to the difficulty in this case are unusual. The plaintiffs first consulted Messrs. Danis and Fennell, solicitors practising in the city of Cornwall to whom, it is said, liability was denied. In January 1950 the plaintiffs consulted Mr. Latchford of the firm of Chevrier, Latchford and Fitzpatrick, who issued the writ. At no time throughout the many discussions with Mr. Latchford after his retainer was the defendant's liability denied. The defendant's interests were looked after by a Mr. Sutton, an insurance adjuster doing business in the city of Cornwall and in this case acting for a firm of underwriters in the city of Toronto which represented Lloyd's of London, who insured the defendant. Mr. Latchford and Mr. Sutton were on familiar and friendly terms. Mr. Latchford had been consulted by Mr. Sutton on several occasions and had acted for the insurers whom he represented when he was engaged in the adjustment of losses. On many other occasions he had acted for clients who had claims against insured persons when Mr. Sutton was engaged to adjust the losses for their insurers. The evidence indicates that they called each other by their first names and undoubtedly they carried on their respective affairs in an atmosphere of mutual trust and good will until the unfortunate incident giving rise to this application arose.

On the material before me where Mr. Latchford's evidence conflicts with Mr. Sutton's I accept Mr. Latchford's without hesitation. Mr. Sutton's actions throughout, his manner of answering questions on cross-examination, the fact that he agreed that certain statements (particularly paras. 11 and 13) in a draft affidavit prepared by Mr. Latchford were correct and was prepared to swear to them, and after sending the draft to his principals in Toronto he subsequently swore to an affidavit dictated over the telephone to a stenographer in Cornwall, which has been filed in these proceedings, but from which these state-

ments, which in some measure corroborate Mr. Latchford's evidence, were deleted, all taken together do not give one confidence in accepting his word and lend strength to an interpretation that may be put on his actions during the negotiations with Mr. Latchford indicating that either he or those whom he represented were purposely lulling Mr. Latchford into a sense of security so that the writ would not be served within the required time.

Mr. Latchford says that from the time he commenced to act for Mr. and Mrs. Robinson he was in communication with Mr. Sutton, discussing the matter of settlement of the action. He says that after he explained the weather conditions relative to the time of the accident Mr. Sutton led him to believe that there was no dispute as to liability and that he, Mr. Sutton, had power to settle the action. A specific proposal of settlement was delayed pending submission of a doctor's report together with a statement of out-of-pocket expenses. The injuries sustained by Mrs. Robinson were serious, and these out-of-pocket expenses were not known until September 1950, when Mr. Latchford wrote a letter to Mr. Sutton giving a statement of them. Mr. Sutton said he forwarded this to his principals asking for a reply, but apparently received none. In October Mr. Latchford sent another letter to Mr. Sutton stating that his clients were prepared to accept a settlement of \$3,500 with \$500 costs. Mr. Sutton told him that he had forwarded this letter to his principals asking for a reply but he had not received any reply.

Why these letters were not replied to and Mr. Latchford advised in a businesslike way as to the insurer's attitude is difficult to understand. From that time to 3rd February 1951 Mr. Latchford was in constant communication with Mr. Sutton. He says that at least twice a week he spoke to him, asking him for some definite word with regard to settlement, and throughout these conversations, although Mr. Sutton stated he had no reply to his letters, he was led to believe by Mr. Sutton that liability was admitted and the quantum of damages was the only matter that was in question. During these negotiations Mr. Latchford on different occasions stated that it would be necessary for him to serve the writ and get on with the action, but each time this was said Mr. Sutton replied that there was no reason for service of

the writ as he was confident that a satisfactory settlement could be arranged. On his cross-examination I do not think Mr. Sutton was quite frank as to what he said to Mr. Latchford about withholding the service of the writ, nor was he frank when he agreed to paras. 11 and 13 of the draft affidavit being deleted from the affidavit he finally made for use before the Court. The following are some extracts from his cross-examination:

"Q. Isn't it a fact you told me when I said to you I am getting on with this matter, I am going to serve the writ and issue the statement of claim, you said to me 'Wait, there is no need for that, I am awaiting instructions, I think we can straighten this out' or words to that effect? A. That is right, sir, I expected final instructions from my principals which I was waiting for.

"Q. And we had a gentleman's agreement between us that I should not proceed with the service of the writ or the statement of claim while you were awaiting instructions, isn't that a fact? A. I was waiting instructions, yes, I expected instructions before the case would be outlawed, yes.

"Q. You were awaiting instructions before the case would be outlawed? A. Yes that is right.

"Q. We had a gentleman's agreement to that, didn't we? A. Well I didn't have an agreement to wait to let the thing go the way it did, I didn't tell you to sit and let the case be outlawed, I am only the in-between man between you and the insurance company.

"Q. Isn't it a fact that you did admit to me that there was some liability? A. Well there is always a certain amount of liability on every case.

"Q. Isn't it a fact that you did admit to me there was some liability? A. Well there would be some liability on the City's part, yes.

"Q. Your answer to my question is yes? A. There could be some liability yes. . . .

"Q. Will you tell me why then I should write you the letter I did on September 7th, 1950? A. Well, after all, my principals are always interested in knowing what the different damages are in these cases.

"Q. Is it not a fact that you asked me for those damages?

A. That is right, I asked you for the amounts of them.

"Q. We even discussed Dr. Caldwell the physician and what his final report might be, do you recall that? A. Well we were awaiting his final report. . . .

"Q. I will put the question to you now—did you ever deny liability to the firm of Chevrier, Latchford & Fitzpatrick? A. No I did not.

"Q. Did your principals ever to Chevrier, Latchford & Fitzpatrick? A. They did not through me.

"Q. I come now, Mr. Sutton, to an affidavit that you were prepared to sign after your principals saw it on February 22nd—will you tell me how you can reconcile paragraph 6 of the affidavit filed in this matter with paragraph 13 of my draft affidavit which you were prepared to sign on February 22nd after you referred it to your principals in which you say that: 'From time to time on these telephone conversations I did advise Mr. Latchford that I felt the matter would be given due consideration by my principals and that I saw no reason for the service of the writ at that time as I expected definite instructions, which I did not receive, would be forthcoming prior to the expiry date of the writ.' How do you reconcile that with paragraph 7 of the affidavit as filed by you? A. I certainly expected final instructions from my principals. . . .

"Q. And paragraph 13 of that engrossed affidavit is exactly as you asked me to put it, isn't that a fact? A. Yes that must be right, Mr. Latchford. . . .

"Q. Isn't it a fact we had a gentleman's agreement as you have admitted a little while ago? A. Up to a certain point yes.

"Q. Mr. Sutton, you gave me an answer there, a rather equivocal one, you said there was a gentleman's agreement up to a point, what was the point? A. It was up to you to decide whether you are going ahead with the thing or not before it was outlawed, I am not a lawyer.

"Q. You told me we had an agreement not to serve the writ or go forward with the statement of claim as you were awaiting an answer from your principals? A. That is right.

"Q. And you were of the opinion that the matter would be settled amicably, isn't that a fact? A. I expected final instruc-

tions from them, I didn't know whether they were going to settle it or not. . . .

"Q. I am not asking you what you had from your principals, I am asking you, isn't it a fact that you told me that you 'felt that the matter would be amicably adjusted between us to the satisfaction of my principals and yours'? A. I might have felt that way.

"Q. And you so expressed yourself to me? A. I might have expressed that in my way to you but it was up to them to give me final instructions on it.

"Q. But you did tell me that? A. All right, I told you that."

The discussions on this basis continued up to 27th January 1951, and there does not appear to have been any change in Mr. Sutton's attitude. On 3rd February Mr. Latchford for the first time realized that the writ had expired on 2nd February and he at once called Mr. Sutton who said: "Well now there is no need to worry about that Jack. We'll fix this all up; don't worry about the fact that the writ wasn't served for a year."

It may be that Mr. Latchford foolishly allowed himself to be lulled into a sense of security and put off his guard by Mr. Sutton's course of conduct, but in order to appraise the situation properly one must remember that they were at least intimate business friends and he had no reason to expect that anyone would seek to take advantage of him if he agreed to Mr. Sutton's request to withhold service of the writ with the result of keeping costs to a minimum.

The question I have to consider is, does the law forbid me to do obvious justice and give the plaintiffs relief by extending the time for a renewal of the writ and making an order for its renewal under the special facts of this case? In order to come to a decision it is necessary to examine closely the relevant decided cases both in our own Courts and in England.

The learned Senior Master relied principally on *Travato v. Dominion Cannery Limited* (1916), 35 O.L.R. 295, 26 D.L.R. 507; *Prescott v. McArthur*, 62 O.L.R. 385, [1928] 3 D.L.R. 489, and *Battersby et al. v. Anglo-American Oil Company, Limited et al.*, [1945] K.B. 23, and he preferred not to follow *Holman v. George Elliot and Company, Limited*, [1944] K.B. 591, which is in con-

flict with *Battersby et al. v. Anglo-American Oil Company, Limited, et al.*

Travato v. Dominion Cannery Limited, supra, is a decision of the Court of Appeal of this Province. At p. 301 Meredith C.J.O., after stating that upon the facts no case was made out for allowing the writ to be renewed, went on to say:

" . . . no case was made for allowing the writ to be renewed, even if, had a case been made, it was in accordance with the practice of the Court to permit a renewal so as to revive a cause of action which had become barred. There is no explanation of the reason for failing to serve the writ while it was yet in force; and, with the knowledge that Klein had in January that it had not been served, there was no reason why it was not served before it had expired, or why an order was not obtained while it was yet alive for its renewal. . . . In addition to all this, there is no satisfactory explanation of the delay of upwards of four months between the 3rd March, when Mr. Counsell was instructed, and the making of the application to the acting Master in Chambers.

"In my opinion, where, owing to the expiry of the writ of summons, a cause of action has become barred, leave to renew the writ *nunc pro tunc* ought not to be granted. . . . The practice in England is well settled, and it is that leave to renew will not be granted if the cause of action has been barred by a statute of limitations."

Although these statements are *obiter dicta*, they are entitled to great weight. *Doyle v. Kaufman* (1877), 3 Q.B.D. 7, affirmed 3 Q.B.D. 340, and *Hewett v. Barr*, [1891] 1 Q.B. 98, were relied on. With reference to *Doyle v. Kaufman* the learned Chief Justice stated:

"Kay, L.J., while concurring in the judgment of the Court, was disposed to think that the Court had power under exceptional circumstances to grant such an application as that which was being dealt with, and said that he could 'imagine a case where, it being proved that every kind of effort had been made to serve the writ, and by accident or mistake no application to extend the time having been made within the year, it would be very hard that the plaintiff should lose all remedy because the period of limitation had in the meantime expired.' "

In *Prescott v. McArthur*, *supra*, Middleton J.A. at p. 386 stated: "Whatever power the Court may have as to extending time, it has long been settled that an extension will not be granted in such a way as to deprive the opposite party to the litigation of a statutory right or defence: *Hudson v. Fernyhough* (1889), 61 L.T.R. 722; *Joss v. Fairgrieve* (1914), 32 O.L.R. 117."

And at p. 387: "I very much doubt whether the Court has power in this case to extend the time for the making of the application or for the making of service after the writ has actually expired, because Rule 9 provides that the order must be obtained before the expiration of the writ, and I think this takes it out of the category of cases in which the general rule (Rule 176) applies."

If the development of the law rested at this point, I feel that I would be obliged, notwithstanding the obvious injustice, to dismiss the appeal. The whole matter has since been dealt with in England and the cases relied on in the Canadian Courts have been reconsidered, in *Holman v. George Elliot and Company, Limited*, *supra*, and *Battersby et al. v. Anglo-American Oil Company, Limited et al.*, *supra*.

In the *Holman* case, on 7th October 1942 the plaintiff, the mother of the deceased workman, commenced proceedings against the defendants by issue of a writ claiming damages under The Fatal Accidents Act. The writ was not served by the solicitors who were then acting for the plaintiff until 7th October 1943, some hours after the end of the year from its issue. The defendants applied to have the writ set aside for failure to serve within the twelve months as required by O. 8, r. 1, of the Rules of the Supreme Court, which reads as follows:

"No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a Judge for leave to renew the writ; and the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original . . . writ of summons be renewed for six months . . ."

(This is the Rule comparable to our Rule 8, to which I shall later refer.)

By O. 64, r. 7: "A court or a judge shall have power to enlarge or abridge the time appointed by these rules . . . for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although application for the same is not made until after the expiration of the time appointed or allowed. . . ." (This is comparable to Rule 176, to which I shall also later refer.)

After considering *Doyle v. Kaufman*, *supra*, and *Hewett v. Barr*, *supra*, MacKinnon L.J. stated at p. 594: "In my opinion, there is no rule that the court or a judge is deprived of any discretion to allow such an extension of time as is involved in this case, but there has been an accepted practice for a long time not to exercise that discretion in such circumstances as were dealt with in *Doyle v. Kaufman*. In the present case, as I have said, the obligation under Lord Campbell's Act to issue the writ within twelve months of the date of the accident had been complied with, and by that issue of the writ, if it had been served in proper time, the defendants would have ceased to be in a position to rely on that limitation. All that has happened is that, owing to lamentable neglect on the part of the managing clerk of the solicitors then acting for the plaintiff, a day over the twelve months was allowed to elapse before he served the writ. In those circumstances, I think, there was a discretion on the part of the learned judge to make the order extending the time, and, in all the circumstances of the case, that is an exercise of his discretion which I think was perfectly right and proper and with which I certainly should not interfere."

Morton J. at p. 595 stated: "I do not think that any of the members of the Court of Appeal in *Hewett v. Barr* intended to exclude the exercise of the discretion under Or. 64, r. 7, in such a case as the one now before us."

In *Battersby et al. v. Anglo-American Oil Company, Limited et al.*, *supra*, the plaintiffs issued a writ under The Fatal Accidents Act on 19th October 1942, but it was not served within the twelve months required by the Rule I have just quoted. On 18th January and 22nd May 1944 applications for renewal of the writ were made to a Master, who refused to grant leave.

On 23rd May 1944 the plaintiff appealed to Stable J., who granted leave to renew the writ for six months from 18th October 1943, and for a further six months from the expiration of that period, this order being made subject to any application to set aside the writ. In June 1944 the writ was served on the defendants, who entered a conditional appearance. On 22nd June an application to set aside the writ was made to the Master, who ordered that the writ and the service thereof be set aside on the ground that at the time of the renewal of the writ the plaintiffs' cause of action under The Fatal Accidents Act had expired. On 27th June 1944, the plaintiffs appealed to Birkett J., who allowed the appeal and directed that the order of the Master should be rescinded and that the order of Stable J. granting leave to renew the writ should stand.

An appeal was taken to the Court of Appeal. Lord Goddard considered the *Holman* case and said at p. 29: "... there is a consistent line of authority that the court will not extend the time in such cases, so as to deprive the defendant of the benefit of the statute. . . ." He quoted from the judgment of Cockburn C.J. in *Doyle v. Kaufman*, *supra*: "The power to enlarge the time given by Or. 57, r. 6 [now Or. 64, r. 7] cannot apply to the renewal of a writ when, by virtue of a statute, the cause of action is gone." But he pointed out: "Perhaps it might have been more accurate to say 'when the remedy is barred,' but the effect is the same."

At p. 31 the learned Lord Justice, referring to *Mabro v. Eagle, Star and British Dominions Insurance Company, Limited*, [1932] 1 K.B. 485 at 487, quoted from the judgment of Scrutton L.J. as follows: "The court has always refused to allow a party or a cause of action to be added where, if it were allowed the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the statute."

Lord Goddard went on to say: "That, if we may say so, puts the reason underlying the rule clearly and emphatically. In the present case the court is apprised of the fact that the period of limitation had run when the application for renewal was made.

To grant the renewal would, therefore, be to disregard the statute, which no court has a right to do merely because its operation works hardship in a particular case."

With the greatest respect, I do not think there is a strict analogy between a case where a writ has been issued within the time allowed by a statute of limitations but not served until after the time has expired and one where no action is brought against a party until after the period has run and it is sought to have him added as a defendant in an action which has been commenced against another party within the period of limitation. In the former case an action was commenced within the proper time and in the latter case no action was commenced within the proper time against the particular defendant sought to be added. There is much less analogy where the writ is issued against a defendant within the time and that defendant knows that it has been issued and with that knowledge is conducting negotiations for settlement.

The Court concluded in the *Battersby* case that the decision in the *Holman* case was in conflict with the earlier decisions and accordingly disregarded it. Leave was given to appeal to the House of Lords but the appeal was not proceeded with. What is most important to the decision I have to make is that Lord Goddard made it perfectly clear at p. 31 that he was not dealing with the case on the footing that there was no discretion vested in the Court to extend the time for renewal of the writ after the statute of limitations had run, but rather on the ground that the discretion vested in the Court as a general rule ought not to be exercised. After referring to *Doyle v. Kaufman* he made this express reservation:

"If such circumstances did not avail the plaintiff, it is indeed difficult to see what accident or mistake would, *though we do not deny that, if the defendant himself had brought about the delay, as, for instance, by asking the plaintiff to withhold service for some reason, he might well be held disentitled to object to a renewal after the prescribed period had expired.*" (The italics are mine.)

In the light of these decisions it becomes necessary to deduce from all these cases the law to be applied to the very peculiar facts of this case. Under s. 453 of The Municipal Act, R.S.O. 1950, c. 243, the limitation is: "(2) No action shall be brought

against a corporation for the recovery of damages . . . after the expiration of three months from the time when the damages were sustained." Unquestionably the writ was issued and the action was brought within the statutory period.

Rule 8 reads as follows: "The writ shall be in force for twelve months from the date thereof, including the day of such date; but if for any sufficient reason any defendant has not been served, the writ may at any time before its expiration, by order, be renewed for twelve months, and so from time to time during the currency of the renewed writ. The writ shall be marked by the proper officer, 'renewed', with the date of the order."

Rule 176 is explicit in its terms. It reads: "The Court may from time to time enlarge or abridge the time prescribed by the Rules, or by an order, for doing any act or taking any proceeding, and this power may be exercised although the application is not made until after the expiration of the time prescribed."

Rule 8 in its terms is more flexible than the English O. 8, r. 1. The words "the Court or Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order", etc., do not appear in our Rule. The words of our Rule, "if for any sufficient reason any defendant has not been served", would appear to be less restricted and import a wider discretion than the English Rule as there are no specific words preceding which may be restrictive of the general. In the final conclusion I have come to this may not be important.

The effect of Rule 8 is not to render the writ a nullity.

In *In re Kerly, Son & Verden*, [1901] 1 Ch. 467 at 478, in referring to the corresponding English Rule, Stirling L.J. stated: "That, it is conceded, does not mean that the writ is not to be in force for any purpose, but only that it is not to be in force for the purpose of service. Therefore, if it is not served within the period of twelve months it is no longer in force for service."

In *Hamp v. Warren* (1843), 11 M. & W. 103, 152 E.R. 733, it was held that a writ that had not been served within the period (four months) prescribed by the statute 2 Will. 4, c. 39, could not be treated as a nullity and the proper course was to move to set it aside.

While Rule 8 provides for the date of the expiration of the writ for service, with the greatest respect to what was said in *Prescott v. McArthur*, *supra*, I feel that the provisions of Rule 176 are applicable. In fact, there is nothing said in any case, except in *Prescott v. McArthur*, to indicate that they are not. In no case either in our Courts or in England has the question been dealt with on a basis that there is no discretion vested in the Court, but rather on the basis of whether the discretion should be exercised to extend the time for renewal of the writ and service after the period fixed by the Statute of Limitations has run.

The obvious purpose of Rule 8 is that the defendants ought not to be kept indefinitely unaware that an action has been commenced and the purpose of a statute of limitations is that defendants are protected against stale claims being advanced after evidence available to the defence may have disappeared which would otherwise have been preserved. In this case none of these factors is present. The defendant was promptly notified of the accident and the defendant knew of the issue of the writ for months before it expired. It was only because of the request of Mr. Sutton that the writ should not be served that Mr. Latchford did not serve it well within the prescribed time. I think this case comes precisely within the language used by Lord Goddard in *Battersby et al. v. Anglo-American Oil Company, Limited et al.*, *supra*, when he said: "... though we do not deny that, if the defendant himself had brought about the delay as, for instance, by asking the plaintiff to withhold service for some reason, he might well be held disentitled to object to a renewal after the prescribed period had expired." It was the agent of the defendant who himself brought about the delay by asking the plaintiffs to withhold service for the reason that negotiations for settlement were being carried on which both he and Mr. Latchford were hopeful would be concluded satisfactorily and that being so, the defendant is now "disentitled to object to a renewal after the prescribed period had expired".

In exercising my discretion under Rule 176 I wish it to be clearly understood that I am confining it to the facts of this case and I am in no way laying down any broad principle but rather a very narrow one that comes within the exception outlined by Lord Goddard.

The appeal from the Senior Master will be allowed in part and an order will go directing that the time for renewal of the writ be extended until 1st August 1951, and that the writ be renewed for a period of twelve months. I know of no practice by which I can validate the service of the writ that has been made. The proper course is to renew the writ and serve the renewed writ, properly marked according to the Rule. As a term of the privilege granted to the plaintiffs the writ is to be served forthwith after its renewal and a statement of claim is to be delivered by 1st September 1951.

The costs of the application will be costs in the cause. The order with respect to costs of the applications before the Master will stand.*

Order accordingly.

Solicitors for the plaintiffs, appellants: Chevrier, Latchford & Fitzpatrick, Cornwall.

Solicitors for the defendant, respondent: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

*Marriott, Senior Master, awarded no costs of the applications before him to either side.

[COURT OF APPEAL.]

Holt v. Nesbitt.

Physicians and Surgeons—Negligence—Action for Malpractice—Applicability of Principle of res ipsa loquitur.

Negligence—Evidence—Res ipsa loquitur—Applicability of Principle to Action against Dentist for Malpractice—Lodging of Sponge in Patient's Windpipe.

While the defendant, a dental surgeon, was extracting a number of teeth under a general anaesthetic a gauze sponge lodged in the patient's windpipe without the defendant's knowledge, and the plaintiff died from asphyxiation.

Held, the defendant was liable in damages to the dependants of the deceased patient.

Per LAIDLAW and GIBSON JJ.A.: The principle of *res ipsa loquitur* was applicable, since the defendant was in sole control of the operation and was solely responsible for the placement and removal of all sponges used by him. *Clark v. Wansbrough et al.*, [1940] O.W.N. 67 at 72, disapproved. The fact of the death from this cause consequently established a *prima facie* case and the defendant was called upon for an explanation to show, not necessarily how the sponge lodged in the windpipe, but that the defendant exercised due care to prevent its getting there. Since the defendant had adduced no evidence at the trial to rebut this *prima facie* case, judgment must go against him.

Per HOGG J.A.: The evidence warranted a finding that the defendant was negligent, not in that there was any want of reasonable skill or competent technique in the actual extraction of the teeth, but in that he failed to take ordinary precautions as to matters requiring no special knowledge or skill, but only the reasonable care of an ordinary man. *Anderson v. Chasney et al.*, [1949] 2 W.W.R. 337, affirmed [1950] 4 D.L.R. 223, quoted and applied. It was therefore unnecessary to decide whether or not the principle of *res ipsa loquitur* applied, but it would seem from a majority of the cases on this question that where negligence of the kind shown in this case was alleged against a professional man such as a surgeon or dentist in the practice of his profession the principle was, in general, applicable.

AN APPEAL by the plaintiff from the judgment of Aylen J., dismissing the action.

7th May 1951. The appeal was heard by LAIDLAW, HOGG and GIBSON JJ.A.

E. C. Bogart, K.C., for the plaintiff, appellant: We do not complain of the skill of the respondent in extracting the teeth, but we do say that he was negligent in the mechanical process of using the sponges. There were no strings attached to the sponges and the defendant did not keep count of them. [LAIDLAW J.A.: Is there any evidence to prove negligence?] We rely on the principle of *res ipsa loquitur*, and submit that the trial judge was wrong in holding that it was inapplicable. We do not know how the sponge got into the deceased man's trachea, but we have established that it did so, and that in consequence the patient died. The defendant did not give any evidence in expla-

nation. The principle operates to shift the onus. I rely on the following cases: *Mahon v. Osborne*, [1939] 2 K.B. 14, [1939] 1 All E.R. 535; *Anderson v. Chasney et al.*, [1949] 2 W.W.R. 337, [1949] 4 D.L.R. 71, affirmed *sub nom. Chasney v. Anderson et al.*, [1950] 4 D.L.R. 223; *Hughston v. Jost*, [1943] O.W.N. 3, [1943] 1 D.L.R. 402; *Taylor et al. v. Gray*, 11 M.P.R. 588, [1937] 4 D.L.R. 123.

A. W. Beament, K.C., for the defendant, respondent: *Res ipsa loquitur*, if it is applicable at all in a malpractice action, can apply only where the circumstances are the admitted cause of the injury and the defendant is called upon to explain why the accident occurred. It was not definitely established in the evidence that the sponge was the cause of death. All we know is that the sponge was in the throat two hours afterwards. The man could have died from shock. There is therefore no onus on us to show how the sponge got there. Moreover, the body was out of the defendant's control for a long time. Once there are two possible explanations of the injury there can be no application of the principle of *res ipsa loquitur*.

The only malpractice action in which *res ipsa loquitur* has been held to be applicable is *Taylor et al. v. Gray*, 11 M.P.R. 588, [1937] 4 D.L.R. 123. On the other hand it has been held by this Court that it does not apply, in *Hutchinson et al. v. Robert*, [1935] O.W.N. 314. I refer also to *Town v. Archer et al.* (1902), 4 O.L.R. 383 at 387; *Clark v. Wansbrough et al.*, [1940] O.W.N. 67; *Hughston v. Jost*, [1943] O.W.N. 3, [1943] 1 D.L.R. 402; *McTaggart et al. v. Powers*, 36 Man. R. 73, [1926] 3 W.W.R. 513, [1927] 1 D.L.R. 28.

Anderson v. Chasney et al., [1949] 2 W.W.R. 337, [1949] 4 D.L.R. 71, affirmed *sub nom. Chasney v. Anderson et al.*, [1950] 4 D.L.R. 223, does not affect this question, since there was a specific finding of negligence in that case.

E. C. Bogart, K.C., in reply: The learned trial judge expressly found that the death resulted from the presence of the sponge in the windpipe, and this excludes any other hypothesis.

Cur. adv. vult.

5th June 1951. LAIDLAW J.A.:—This is an appeal by the plaintiff from a judgment of Mr. Justice Aylen dated the 8th January 1951, dismissing with costs an action brought under

The Fatal Accidents Act, now R.S.O. 1950, c. 132, to recover damages suffered by the plaintiff and her infant children by reason of the death of her husband, alleged to have been caused by the negligence of the defendant.

The material facts, as they appear in the case for the plaintiff, may be stated in one sentence. While the defendant, a dental surgeon, was operating on the late Lee Robert Holt to extract a number of teeth, and while the patient was under a general anaesthetic, a gauze sponge, measuring when unrolled 18 x 25 centimetres, lodged in the windpipe of the patient without the knowledge of the surgeon, and the patient died from oxygen lack, which in turn was related to the obstruction in the windpipe. Counsel for the respondent argued that the evidence is capable of two views, namely, that the patient died of shock, and that he died of asphyxia caused by foreign matter in the trachea. He contends that it is not established as a fact that a sponge lodged in the trachea of the patient during the operation and that his death was caused by that obstruction. I cannot accept that argument. My opinion is that the facts as I have stated them are the only findings that could properly be made on the evidence.

At the opening of the trial counsel for the defendant applied to the judge under s. 10 of The Evidence Act, R.S.O. 1950, c. 119, for leave to call more than three witnesses entitled according to the law or practice to give opinion evidence, and leave was granted. At the close of the plaintiff's case, counsel for the defendant, after taking time to confer with the defendant, stated to the Court that he did not propose to call any evidence. After hearing argument of counsel, the learned trial judge reserved his judgment.

The statement of claim contains particulars of the negligence alleged against the defendant, but at the trial and also in this Court counsel for the plaintiff relied upon the rule *res ipsa loquitur* to establish a *prima facie* case against the defendant. The learned trial judge stated in his judgment that: "There is ample authority for the statement that the doctrine of *res ipsa loquitur* does not apply in such cases and some act of negligence must therefore be proved."

With much respect for the opinion of the learned trial judge, I must disagree with that statement and with his judgment.

The expression *res ipsa loquitur* has been referred to from time to time as a principle and as a doctrine. However, it is merely a maxim or rule of evidence which "asserts the existence of a *prima facie* case against the defendant": *Montreal Transportation Co. v. The King*, [1924] 4 D.L.R. 808, affirmed [1926] 2 D.L.R. 862. The rule was declared with clarity by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company* (1865), 3 H. & C. 596, 159 E.R. 665, in these terms:

"There must be reasonable evidence of negligence.

"But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The rule has been the subject of general discussion in many cases, and I mention only some of them: *Pym v. The Great Northern Railway Company* (1861), 2 F. & F. 619, 175 E.R. 1212; *Byrne v. Boadle* (1863), 2 H. & C. 722, 159 E.R. 299; *Briggs v. Oliver* (1866), 4 H. & C. 403; *Ballard v. North British Railway Company*, [1923] S.C. (H.L.) 43; *Mahon v. Osborne*, [1939] 2 K.B. 14, [1939] 1 All E.R. 535. Also the following cases in our Courts: *Brawley v. Toronto R.W. Co.* (1919), 46 O.L.R. 31, 49 D.L.R. 452; *Canadian Northern Railway Company v. Horner*, 61 S.C.R. 547, 58 D.L.R. 154, [1921] 1 W.W.R. 969; *Malone v. Trans-Canada Airlines*; *Moss v. Trans-Canada Airlines*, [1942] O.R. 453, [1942] 3 D.L.R. 369, 54 C.R.T.C. 331.

In *Ballard v. North British Railway Company*, *supra*, Lord Dunedin, at p. 53, said: "... whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence."

In *Mahon v. Osborne*, *supra*, it was held by MacKinnon and Goddard L.JJ. (Scott L.J. dissenting) that where at the end of an abdominal operation a swab which had been used by the surgeon to pack off adjacent organs from the area of the operation was left in the patient's body, with the result that three months later he died, the rule applied so as to shift the burden of proof to the defendant. Scott L.J. was of the opinion that

the rule did not apply to the circumstances of the particular case, but he did not decide that it did not apply in any malpractice case. On the contrary, it may be inferred from his reasons for judgment that in his opinion there may be circumstances where the rule is applicable in actions of negligence against a surgeon. He carefully explains the application of the rule in these terms, at p. 21:

“The very essence of the rule when applied to an action for negligence is that on the mere fact of the event happening, for example, an injury to the plaintiff, there arise two presumptions of fact: (1) that the event was caused by a breach by somebody of the duty of care towards the plaintiff, and (2) that the defendant was that somebody. The presumption of fact only arises because it is an inference which the reasonable man knowing the facts would naturally draw, and that is in most cases for two reasons: (1) because the control over the happening of such an event rested solely with the defendant, and (2) that in the ordinary experience of mankind such an event does not happen unless the person in control has failed to exercise due care.”

In the light of the judgment of the Court in *Mahon v. Osborne*, *supra*, I am not prepared to accept or follow the opinion of McTague J.A. in *Clark v. Wansbrough et al.*, [1940] O.W.N. 67 at 72, that “The doctrine *res ipsa loquitur*, no matter how ingeniously put, has no application in malpractice cases”. That view of the law would create an exception to the rule which does not exist and which has no sufficient foundation or reason to support it. It would give to doctors, dentists and members of other professions an unfair and unwarranted protection in actions where their conduct in the exercise of their profession is called into question. It would permit them to refuse to give an explanation in a court of justice of a happening which has caused injury to a person, even though the occurrence was of such a kind and description that a reasonable man would naturally infer from it that it was caused by some negligence or misconduct. It would place them in a position in the courts that in a case such as the present one the defendant could unfairly and unjustly say: “I alone am responsible for all that happened in the course of the operation. I know all the facts from which it can be decided whether or not I used due care.

I can explain the happening, but I refuse to do so." To permit a defendant to take such a position in a court of law would be, in my opinion, a denial of justice to a person who knows nothing of the matter that caused his injury and seeks to recover for the loss suffered by reason of it from the person who possesses full knowledge of the facts.

Undoubtedly there are events which occur in the course of a surgical operation which are of such a character that an inference of negligence cannot be properly drawn by a judge from them, but there are also happenings which speak for themselves in a plain and unambiguous way and should be regarded by the Court as evidence establishing a *prima facie* case of negligence. The particular circumstances of each case must be considered by the Court in determining the question whether or not the rule is applicable.

I have read and now refer to the following cases in which the rule was not applied: *Hutchinson et al. v. Robert*, [1935] O.W.N. 314, (a fragment of surgical forceps broke during an operation); *Nykiforuk v. Lockwood*, [1941] 1 W.W.R. 327 (teeth wrongly identified by a patient were extracted by a dental surgeon); *McFadyen et al. v. Harvie et al.*, [1941] O.R. 90, [1941] 2 D.L.R. 663, affirmed [1942] S.C.R. 390, [1942] 4 D.L.R. 647 (it was not shown that the control over the happening of the event relied upon rested solely with the defendant); *Hughston v. Jost*, [1943] O.W.N. 3, [1943] 1 D.L.R. 402 (sodium pentathol injected intravenously leaked into surrounding tissues); *Scrimgeour v. Board of Management of Canadian District of the American Lutheran Church*, [1947] 1 W.W.R. 120, [1947] 1 D.L.R. 677 (electricity escaped from a reading-lamp which was not shown to be under the sole control of the defendant); *Fish v. Kapur et al.*, [1948] 2 All E.R. 176 (a jawbone was fractured and roots of teeth were not wholly removed in the operation of extraction). The rule was not applied where a tooth passed into a patient's lung during the time or after a dentist operated on her in *McTaggart et al. v. Powers*, 36 Man. R. 73, [1926] 3 W.W.R. 513, [1927] 1 D.L.R. 28, but in that case Dennistoun J.A. pointed out that it was argued that the dentist must account for the tooth found in the lung and absolve himself from negligence in respect of it, and he then said:

"I think that would be so if the dentist while extracting a tooth allowed it to pass down the throat instead of removing it through the mouth. In such a case the onus would be upon him to satisfy the jury that an accident had happened for which he was not responsible.

"Here we have a different case for the tooth in the lung may or may not have been dislodged by the operation. It may or may not have passed into the throat while the child was under the dentist's control. It may or may not have been swallowed while the child was in the dentist's office."

The rule has been applied in the following cases: *Taylor et al. v. Gray*, 11 M.P.R. 588, [1937] 4 D.L.R. 123 (a pair of forceps was left in an abdomen after an operation); *Abel v. Cooke et al.*, [1938] 1 W.W.R. 49, [1938] 1 D.L.R. 170 (a patient was burned while being examined under an x-ray machine); *Burtnick v. Soffer et al.*, [1938] 1 W.W.R. 761, [1938] 2 D.L.R. 409 (injuries to the scalp of a person occurred in a beauty parlour treatment); *Arendale et al. v. Canada Bread Company Ltd.*, [1941] O.W.N. 69, [1941] 2 D.L.R. 41 (particles of glass were embedded in a wrapped loaf of bread); and see *Mahon v. Osborne, supra*.

In the present case the defendant was in sole command of the operation and was solely responsible for the placement and removal of all sponges used by him. It was part of the operation to insert the sponges in the mouth of the patient and it was part of the operation to take them out. It requires no special knowledge on the part of a judge presiding at a trial, and no expert evidence is necessary, to enable him to draw the inference that in the usual course of events in an operation for extraction of teeth a sponge of the size described in the present case does not lodge in the windpipe of a patient so as to create an obstruction there if the dental surgeon uses due care. The natural inference immediately arising in the mind of a reasonable person from the fact of such a happening is that there was negligence on the part of the surgeon. That fact speaks for itself and tells its own story of negligence on his part: see 23 Halsbury, 2nd ed. 1936, pp. 671 *et seq.*

It appears plain to me in the present case that the defendant was called on for an explanation to show not necessarily why the sponge lodged in the patient's windpipe but that he exercised

due care to prevent its getting there. The defendant knows or ought to know where and how he placed the sponges in the mouth of his patient during the operation. The dependants of the deceased patient know nothing of the matter. They are entitled to call upon him to satisfy the Court that he exercised due care in the placement of the sponges and while they were in the mouth of the patient.

I hold that the rule *res ipsa loquitur* is applicable in the present case. The plaintiff made out a *prima facie* case of negligence against the defendant, and, in the absence of explanation such as I have described, the defendant should be held liable in damages.

I have perused the reasons for judgment prepared by my brother Hogg. I do not dissent from his views but prefer to rest my judgment solely on the application of the rule *res ipsa loquitur* to the particular facts of this case. I accept the assessment of damages as made by him. I agree that the appeal should be allowed with costs. The judgment of the Court below should be set aside and in place thereof judgment should be given against the defendant for the respective amounts of damages as assessed by my brother Hogg, together with costs of the action.

Hogg J.A.:—The late Robert Holt died on the 27th February 1950 in the office of the respondent, Dr. Percy L. Nesbitt, a dentist practising his profession in the city of Ottawa, while the deceased was having a number of teeth extracted by the respondent. An action was brought by the appellant, Mrs. Mina Holt, the widow of the deceased, under the provisions of The Fatal Accidents Act, in which the appellant alleged that it was negligence on the part of the respondent which caused the death of her husband and claimed damages.

The action was tried by Mr. Justice Aylen and was dismissed on the 8th January 1951. The appeal is from the said judgment. At the close of the appellant's case at the trial, counsel for the respondent informed the Court that he did not propose to call evidence, and did not do so.

The evidence adduced by and on behalf of the appellant, a portion of which consists of several questions and answers from the respondent's examination on discovery, shows that the de-

ceased, Holt, had arranged with the respondent to have 12 or 14 teeth extracted and had requested that nitrous oxide be used as an anaesthetic. On the morning of the 27th February 1950 the respondent, assisted by his nurse Mrs. Cameron, had extracted, in a period of 15 minutes, 10 of the teeth of the deceased, when he noticed that Holt had suddenly become pale and that his lips had taken on a gray or blue tinge. There had been no other warning that anything was wrong and that the patient was not getting any or sufficient oxygen and was strangling.

The administration of the nitrous oxide gas and oxygen, which was the anaesthetic employed on this occasion, was at once stopped and oxygen gas alone was administered, when Holt seemed to revive to some degree. However, his breathing ceased and he was taken out of the dental chair and placed on the floor and artificial respiration was applied. Four sponges or swabs of cotton gauze had been removed from Holt's mouth before it was observed that he had turned pale, and the respondent said on his examination for discovery that only one remained, which was hanging out of Holt's mouth. The testimony of the respondent on examination for discovery is in part as follows:

"Q. And then, doctor, when he turned pale, what did you do? A. I gave him oxygen.

"Q. Just a minute. Had the sponges been removed? A. Yes, all but one. The last one here on the right side. We were about to take out the last two roots.

"Q. Now, was there still one sponge left? A. Yes, hanging out of his mouth."

An attempt was made to remove this sponge after Holt had stopped breathing, but it tore and part of it remained in his mouth, At this time the respondent thought that Holt was dead.

The emergency squad of the Ottawa Fire Department was at once summoned and an attempt was made by mechanical means to induce respiration, but these efforts were fruitless. H. C. Love of the Ottawa Fire Department, who operated the mechanical device spoken of as a resuscitator, said that his first act was to look into Holt's mouth and throat to ascertain if there was any obstruction to his breathing but he saw none. While the firemen were thus engaged, Dr. Cromar and Dr. Sheriff, a

coroner, arrived. The attempt to induce respiration was in due course stopped on instructions from Dr. Sheriff.

Dr. Max Klotz, the pathologist of the Ottawa Civic Hospital, performed an autopsy upon the body of Holt some two hours after his death and found within the windpipe, or trachea, a large blood-soaked sponge or swab of folded gauze which wholly obstructed the air passage and completely prevented the deceased from breathing. Dr. Klotz said that, although an examination was not made of the brain or of the spinal cord, he was convinced that the cause of death was asphyxia induced by the obstruction found in the air-passage of the deceased. He also expressed the opinion that death from asphyxia could be caused by shock or by a lesion in the brain.

The learned trial judge found that a swab or sponge became lodged in some unknown manner in Holt's windpipe while he was under an anaesthetic and that this sponge "was not observable upon an examination of the patient's mouth". The trial judge further said that "since it was not known that the patient's windpipe was blocked" the efforts made to revive the deceased were without effect. A passage from the judgment in the leading case of *Lanphier et ux. v. Phipos* (1838), 8 C. & P. 475, 173 E.R. 581, is quoted by the trial judge, to the effect that a member of a learned profession must exercise a fair, reasonable and competent degree of skill. The learned trial judge said that he must assume, in the absence of evidence to the contrary, that the respondent, who was duly qualified to practise his profession and had done so for a considerable number of years, was competent to perform the operation in question. He was of the opinion that the maxim *res ipsa loquitur* did not apply in cases of this character and that the appellant was under obligation to prove a specific act or acts of negligence, which had not been done, and the action was dismissed for the reason that there was no evidence that the swab had got into the deceased's windpipe as the result of any negligence on the respondent's part.

The facts shown in evidence in this appeal raise several interesting questions:

(1) Is it to be concluded that the evidence establishes negligence on the part of the respondent?

(2) If negligence is not established by the evidence is there in this case a presumption of negligence, that is to say, should the rule of *res ipsa loquitur* be invoked?

It is true that a professional man, be he a physician, a surgeon or a dentist, must bring to the exercise of his profession a fair, reasonable and competent degree of skill and care. This axiom has been stated in many judgments, and if an injury to a patient or death is caused by the want of such reasonable and competent skill, the professional man who has treated the patient or who has performed an operation, if injury has resulted, may be found liable. There is a presumption that he possesses the required skill: *Jewison v. Hassard* (1916), 26 Man. R. 571, 10 W.W.R. 1088, 4 W.L.R. 904, 28 D.L.R. 584.

However, in the course or upon the completion of an operation it may become necessary that certain measures be taken by a surgeon or a dentist which do not involve any special knowledge, skill, experience or technique. The facts of this case do not show that the respondent did not display and use reasonable and competent skill or that proper technique in the extraction of Holt's teeth was not applied and was lacking. It appears to me, however, that the question does arise whether ordinary precautions were taken as to matters in regard to which only the reasonable care of an ordinary man and not special knowledge or skill would be required.

There is no evidence before the Court as to whether it is the practice for a dentist in the operation of extracting teeth to keep track of the number of gauze swabs or sponges which he places in and takes out of a patient's mouth, nor is there evidence that a sponge of any certain type should be used. That no count of the sponges was made is evidenced by the fact that the sponge which lodged in Holt's windpipe was overlooked. There is the testimony of the respondent himself upon examination for discovery that gauze swabs or sponges had been placed in Holt's mouth, and that when his patient showed signs of distress all of the sponges then in his mouth, except a part of one which could be seen, were or had been removed. There is no evidence which establishes that a search had been made to discover whether the cause of Holt's collapse might have been due to a sponge which obstructed his breathing, otherwise than looking into his mouth and throat. It may be that the removal

of the sponge which blocked the patient's air-passage would entail skill and knowledge that a dentist would not be expected to possess. There is no evidence in this regard to assist the Court. But it seems to me that there remains the question whether a prudent man without the advantage of any special skill should not have anticipated that the unfortunate mishap might have been caused by one of the swabs or sponges, which had during the operation been placed in Holt's mouth, blocking the passage of air or oxygen into his lungs, and have made some effort to find and to remove the obstacle.

Although Dr. Klotz upon cross-examination by counsel for the respondent was of the opinion that where death is caused by asphyxia that condition could be induced by shock or a lesion in the brain, the preponderance of evidence is, and the opinion of the trial judge is, that death was caused by the gauze sponge forming an obstruction in the deceased's windpipe or trachea. The cause of Holt's death and the surrounding circumstances are known and the decision has now to be made whether or not the evidence is sufficient to establish negligence on the part of the respondent.

There is a recent judgment of the Court of Appeal of Manitoba in *Anderson v. Chasney et al.*, [1949] 2 W.W.R. 337, [1949] 4 D.L.R. 71, which was affirmed by the Supreme Court of Canada *sub nom. Chasney v. Anderson et al.*, [1950] 4 D.L.R. 223, that warrants careful consideration. The reasons for judgment of the several members of the Court are not only of interest, but are of material assistance in the determination of the present appeal. The facts were somewhat similar to those of the case at bar. A surgeon had performed a tonsil-and-adenoid operation on a child, and had used sponges without tape or strings attached thereto, and proceeded with the operation without having a nurse present to check on the number of sponges. After the operation the child suffocated, owing to a sponge which was left in the lower part of his throat. The surgeon performing the operation had asked his anaesthetist whether all the sponges had been removed and when he was answered in the negative he felt in the throat of the child with his fingers, and then with forceps, but did not find the sponge. When it was noticed that the child was not breathing, a nurse reached

in and removed the sponge, but the child was already dead. The headnote of this case in D.L.R. reads in part as follows:

"Expert evidence as to general or approved practice, *e.g.*, by physicians or surgeons, cannot be accepted as conclusive on an issue of negligence, especially where the conduct in question does not involve a matter of technical skill and experience but rather the taking of proper precautions in regard to something on which the ordinary person is competent to determine whether there has been carelessness or not, *e.g.*, failure to remove a sponge used in a tonsil and adenoid operation."

Chief Justice McPherson in his reasons for judgment said that the surgeon had performed two operations on the child, in removing first his tonsils, and second his adenoids, and that: "Both operations were properly performed and there is no suggestion of bringing the defendant's skill into question. The child's death was caused by the fact that after the second operation a sponge was left in the base of the child's nostrils which caused suffocation. . . .

"While the method in which the operation was performed may be purely a matter of technical evidence, the fact that a sponge was left in a position where it was or was not dangerous is one which the ordinary man is competent to consider in arriving at a decision as to whether or not there was negligence."

Mr. Justice Coyne, at p. 354, expressed the following opinion: "Whether or not it is negligence to omit to use sponges with ties or to have a count kept is not a matter which requires an expert to decide: it is not special surgical skill that is in question. Such skill is not necessary to answer the question. The point involved is negligence or no negligence."

A passage from the judgment of Mr. Justice Dysart is as follows:

"This case is not a question of skill—the operation itself seems to have been performed with all required skill and care. It is not as if the defendant had tried to remove the sponge and had failed. If such a failure had occurred, the question of skill would then arise and would have to be decided upon evidence of whether or not the defendant, in attempting to remove the sponge, had used ordinary skill according to standard methods. But the defendant had not even tried to remove the sponge.

Little skill was required for the removal. The sole reason for his failure to remove is that he overlooked or forgot that he had left the sponge in the cavity. Clearly, the unfortunate oversight was due to want of proper care—that is, due to negligence of the defendant.”

Mr. Justice Adamson was of the opinion that: “If a surgeon places a foreign article or substance such as a sponge or instrument in the body of a patient and fails to remove it and the patient is thereby injured, it is evidence of lack of care. Whether it should be held to be negligence depends on the circumstances in each particular case.”

No question arises in the present case that the respondent did not exercise the care and skill required in the operation entailing the extraction of the teeth. But because a count of the sponges had not been made and because the patient had ceased to breathe and had exhibited none of those usual signs of collapse related by the respondent on discovery, which sometimes become apparent when a patient is under the anaesthetic, and the absence of which would be some indication that something out of the ordinary had happened, and, furthermore, when Holt did not respond to the administration of oxygen gas, I think the respondent should have anticipated that possibly a sponge had closed the air-passage and have tried to find it and remove it. If he had failed in an attempt to remove the sponge the question might then arise as to whether he exhibited, or was expected to have, the skill and knowledge required to remove it from the position in which it had lodged.

I have arrived at the conclusion, based upon the evidence before the Court, that ordinary care and prudence was not shown by the respondent in his overlooking the fact—especially as there is the evidence that no count of the sponges was kept—that a sponge in Holt’s windpipe might be the cause of his ceasing to breathe and in making no effort to ascertain whether this was the case other than looking into the patient’s mouth, and as a consequence in making no attempt to remove the obstruction which terminated Holt’s life. I think the respondent must be held to have been negligent. It is not intended that any general rule should be laid down.

In reaching this decision, I do not wish to appear to criticize or disparage in any manner the service that is rendered to

mankind by the professions of surgery, medicine and dentistry. Unfortunately, there are occasions when the standard of care which not only the law but the members themselves of these professions require is not satisfied.

Because of the finding of negligence, it is not material in the present case whether the rule of *res ipsa loquitur* is applicable or not. However, if it were held that the evidence did not warrant or justify a finding of negligence on the part of the respondent but that the learned trial judge was in error in not applying the rule of *res ipsa loquitur* and thereby throwing upon the respondent the task of proving he was not negligent, the consequences, in my view, would be the same as where the respondent is found guilty of negligence upon the evidence as it stands, in so far as the effect upon the judgment is concerned, that is to say, it would be set aside in either case.

Counsel for the appellant in argument also placed special emphasis upon the ground of appeal that the trial judge was in error in holding that the rule of *res ipsa loquitur* did not apply. Because of these several circumstances I think consideration should be given to this aspect of the case.

The maxim or rule is not a doctrine or a principle of law, it is a rule of evidence and its application does no more than shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon the defendant the task of proving that he was not negligent.

In *Barkway v. South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392, in the House of Lords, Lord Normand in speaking of the maxim said: "... if the cause of the accident is proved, the maxim, *res ipsa loquitur* is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. The maxim is no more than a rule of evidence affecting *onus*. It is based on common-sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."

As has been asserted in a number of cases, the rule applies when the direct cause of an accident and so much of the surrounding circumstances as was essential to its occurrence are

within the sole control and management of the defendants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened: *Wing v. London General Omnibus Company*, [1909] 2 K.B. 652.

In *Hutchinson et al. v. Robert*, [1935] O.W.N. 314, Middleton J.A. held, in a case where a small portion of the end of forceps used in an operation remained in the wound and this fact was not noticed by the surgeon at the time, that the rule of *res ipsa loquitur* did not apply, and that it must be shown that there was negligence and that that negligence was the cause of the injury complained of.

In *Clark v. Wansbrough et al.*, [1940] O.W.N. 67, Mr. Justice McTague stated that *res ipsa loquitur*, "no matter how ingeniously put, has no application in malpractice cases. The plaintiff must prove negligence."

In *McFadyen et al. v. Harvie et al.*, [1941] O.R. 90, [1941] 2 D.L.R. 663, affirmed [1942] S.C.R. 390, [1942] 4 D.L.R. 647, Chief Justice Robertson was of the opinion that the rule of *res ipsa loquitur* did not apply to the facts of that case.

In the case of *Mahon v. Osborne*, [1939] 2 K.B. 14, [1939] 1 All E.R. 535, a swab had been left in the patient's body by a surgeon after an operation had been completed. The circumstances of the operation were difficult owing to the condition of the patient. Scott L.J. expressed the opinion that it was difficult to see how the rule of *res ipsa loquitur* could apply, generally, to actions for negligence against a surgeon for leaving a swab in the patient "even if in certain circumstances the presumption may arise". He concluded that the rule did not apply because of the number of matters of special skill involved in the case.

MacKinnon L.J. said at p. 38: "The plaintiff, having no means of knowing what happened in the theatre, was in the position of being able to rely on the maxim *res ipsa loquitur* so as to say that some one or more of these five [the surgeon, anaesthetist and nurses] must have been negligent since the swab was beyond question left in the abdomen of the deceased."

Goddard L.J. (now Lord Chief Justice) said at p. 50: "... I think it right to say that in my opinion the doctrine of *res ipsa loquitur* does apply in such a case as this, at least to the extent I mention below.

"The surgeon is in command of the operation, it is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or, if he dies, his representatives, can know nothing about this matter. There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body, and no one would venture to say that it is proper, although in particular circumstances it may be excusable, so to leave them. If, therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called on for an explanation, that is, he is called on to show not necessarily why he missed it but that he exercised due care to prevent it being left there."

The comparatively recent case of *Fish v. Kapur et al.*, [1948] 2 All E.R. 176, concerns a charge of negligence against a dentist in the extraction of a tooth, but the judgment that the rule *res ipsa loquitur* did not apply is not of assistance because it was held that the evidence did not even establish a *prima facie* case of negligence against the dentist. The question of negligence was the subject of evidence by professional men, in other words, the evidence of experts.

In *Taylor et al. v. Gray*, 11 M.P.R. 588, [1937] 4 D.L.R. 123, in the Court of Appeal of New Brunswick, it was held that the maxim *res ipsa loquitur* did apply to cases where a surgeon was charged with want of competent skill in the performance of an operation.

It is fully apparent that the judgments of the Courts to which I have referred on this subject, as they relate to cases of the nature of the present one, do not express or arrive at a clear and unequivocal conclusion and it is manifest that there are decisions which support the opinion of the learned trial judge that the maxim in question does not apply to the facts of this case.

I think the conclusion may be drawn from a consideration of the cases I have mentioned, with the exception of *Clark v. Wansbrough et al.* and *Hutchinson et al. v. Robert*, that where the negligence alleged against a professional man such as a surgeon or dentist in the practice of his profession is of the character shown by the facts of the present case, the rule of *res ipsa loquitur* is, in general, applicable.

This action was brought by the widow on behalf of herself and her two infant children. Mrs. Holt was 21 years of age on the 18th June 1950, and her two infant children Judy and Brian were born on the 24th August 1948 and the 12th August 1949 respectively. The deceased Holt was 20 years of age on the 8th July 1949. He had been employed by various people as a taxi or truck driver at a wage of some \$35 a week.

On the 4th January 1949 the appellant and her husband executed what is commonly called a separation agreement. The circumstances surrounding the making of this agreement were unusual as the appellant said it was a temporary arrangement, to exist only until the parties could make a home of their own. They had been living with Holt's parents. There was no provision for the wife's maintenance and support included in the terms of the agreement but the child Judy was to receive from Holt, for her maintenance, the sum of \$25 a month. After the younger child was born a further arrangement was made that \$40 a month would be paid by Holt for the support of the two children. This payment was regularly made up to Holt's death. Marital relations apparently did not cease between the parties but Holt did not contribute anything to his wife's support.

I think that it is reasonable to infer from the evidence that Holt and his wife would have lived together again in the usual and ordinary fashion. Taking into account the ages of the appellant and her husband at the time of his death, and those of the children, and applying the well-known principles governing the fixing of the amount of damages in an action under The Fatal Accidents Act, I think that the appellant widow and the two children should receive the sum of \$2,000 each and the costs of the action and the appeal.

The judgment should be set aside and judgment entered in the above-mentioned terms. The appellant should have the costs of the trial and the appeal.

GIBSON J.A. agrees with LAIDLAW J.A.

Appeal allowed with costs throughout.

Solicitor for the plaintiff, appellant: Lionel Choquette, Ottawa.

Solicitor for the defendant: Stanley G. Metcalfe, Ottawa.

[McRUER C.J.H.C.]

Re Hill.

Dower — Election — When Widow Put to her Election — Necessity for Specific Intention in Will to Exclude Dower — Creation of Blended Fund from Proceeds of Realty and Personalty, with Direction for Payments to Widow out of Capital — Only Residuary Beneficiaries Affected.

The fact that a testator has directed that a blended fund shall be set up, comprising the proceeds of both his realty and his personalty, and that periodical payments shall be made to his widow out of the capital of this fund, is not in itself evidence of an intention that the benefits given to the widow are to be in lieu of dower, and does not necessarily mean that she is put to her election. *Re Hendry*, [1931] O.R. 448 at 452; *Re Williamson*, [1943] O.W.N. 270 at 273 (affirmed without written reasons [1943] O.W.N. 411), not agreed with. The widow will be put to her election only if the benefits given to her under the will, together with her dower interest, will in some way defeat the testator's intention, *e.g.*, by reducing the share of another beneficiary, other than a residuary beneficiary, or by giving the widow a greater share of the estate than the testator, on a true construction of the will, intended. *Greator v. Cary* (1802), 6 Ves. 615, applied; other authorities reviewed.

Wills — Construction — Presumption against Intestacy — No Disposition of Income as Such.

A testator is presumed to have disposed of his whole estate and where he disposes of portions of the capital, with a direction as to the disposition of the residue, but makes no express disposition of income, he is presumed to have intended that the income should fall into the residue of the estate, and be distributed to the residuary beneficiaries according to the terms of the will.

A MOTION by the executor and trustee of the will of Reginald Mark Hill, deceased, for the construction of the will.

21st May 1951. The motion was heard by McRUER C.J.H.C. in Weekly Court at Toronto.

H. G. Steen, K.C., for the executor and trustee, applicant.

H. D. Langdon, for the widow of the testator.

J. E. C. Beatty, for the Official Guardian, representing an infant son of the testator.

29th June 1951. McRUER C.J.H.C.:—This is an application for the construction of the last will and testament of Reginald Mark Hill. After making provision for payment of debts and succession duties, the testator devised and bequeathed all his estate both real and personal to his executor and trustee upon trust, to convert his estate into money and to invest the proceeds in trust securities or in securities that are a legal investment for Canadian life insurance companies, and to pay \$1,000 to "Sick Children's Hospital at Toronto". Then follow six pecuniary

bequests to employees and to children of gross amounts payable by instalments, each stated to be "out of the capital of my estate". The paragraphs that give rise to this application read as follows:

"(i) To pay and deliver to my wife, Isabella Christina Hill, if and while living, out of the capital of my estate, the sum of three thousand dollars (\$3,000) six months after my death and thereafter two hundred and fifty dollars (\$250) per month, without interest, out of capital during the natural life of my said wife.

"(j) Upon the death of my wife, Isabella Christina Hill, to pay and deliver the rest and residue of my estate, after payment of or provision for the above specific legacies, equally among my children above named, the children of any deceased child to take the parent's share per stirpes."

Nowhere in the will is the income from the estate dealt with as such.

The questions submitted to the Court are:

"1. Are the benefits given by the said Will to Isabella Christina Hill, widow of the deceased, in addition to or in lieu of her dower interest in the real property of the deceased?

"2. Is Isabella Christina Hill, widow of the deceased, entitled to be paid her dower interest upon the sale of the real property of the deceased, in addition to the benefits which she receives under the Will?

"3. Is there an intestacy with respect to the income of the estate?

"4. To whom is the income of the estate payable and how should it be distributed?"

All parties agree that if the widow is not put to her election the estate is still sufficient to pay all the pecuniary legacies, including the payments to the widow, and make provision for the widow's dower interest. The adult beneficiaries have signified their wish that a construction should be put on the will that will give their mother the maximum income possible from the estate, and through counsel representations have been made to the Court that they support their mother's contention that under the terms of the will she is not put to her election.

Mr. Beatty, on behalf of the infant, argues that on the authorities as they stand in Ontario the widow must elect as to

whether she will take her dower interest or her interest under the provisions of the will.

The problem is far from a simple one and I think it can best be solved by considering the authorities here and in England having some regard for their chronological order. This is particularly necessary as I have come to the conclusion that there are some statements in the cases that are conflicting and are not fully warranted by the language used in the earlier authorities relied on.

The first and fundamental principles to be considered are laid down in *Gibson v. Gibson* (1852), 1 Drew. 42, 61 E.R. 367, where the Vice-Chancellor stated at p. 51:

"The question to be determined in this case is, whether the widow of the testator ought to be put to her election between her dower, and the benefits given to her by the will of her husband.

"It is difficult, perhaps impossible, to reconcile all the authorities on this subject; but it is impossible to examine them without perceiving that there are certain broad and clear principles which ought to form the foundation of every decision on the subject. Putting these principles into the form of propositions, they may be stated as follows: The first is, that the doctrine of election is precisely the same, and founded on the same reasons, and governed by the same rules, when applied to dower, as when applied to any other case; there is not one doctrine of election applicable to the case of a widow claiming dower, and another doctrine of election applicable to other cases.

"The second proposition is, that the doctrine of election, as applicable equally to all cases, is this: that a person who is entitled to any benefit under a will or other instrument must, if he claims that benefit, abandon every right or interest, the assertion of which would defeat, even partially, any of the provisions of that will or instrument; and applying this to the particular case of dower, the doctrine may be thus stated: that if the testator has by his will made such a disposition of the real estate of which he was seised, that the assertion by the widow of her right to dower would prevent that disposition having full effect, as the testator intended, then she must elect to abandon either her dower, or the benefit given to her by the will.

"The third proposition is, that in no case is a person to be put to his election, unless it is clear that the provisions of the instrument under which he is entitled to a benefit, would be in some degree defeated by the assertion of his other right. And therefore, in the particular case of dower, unless it be clear and beyond reasonable doubt that the testator intended to make such a disposition of the real estate, that the assertion by the widow of her right to dower, would prevent the giving full effect to his intention, the widow shall not be put to her election. It is not enough to say that upon the whole will it is fairly to be inferred that the testator did not intend that his widow should have her dower; in order to justify the Court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from dower, either expressed or clearly implied.

"The fourth proposition is, that the intention to exclude the wife from her dower, must be apparent on the face of the will itself."

The precise question I have to decide may be stated thus: Where a testator has directed that his real and personal estate be disposed of so as to be blended into one trust fund out of which there are to be paid specific sums at specific times to the widow, is she put to her election where the only other interest given under the will which is affected is that of the residuary beneficiaries?

Ellis v. Lewis (1844), 3 Hare 310, 67 E.R. 400, is an authority of long standing. At p. 313 the Vice-Chancellor stated: "It appears, from some of the earlier cases, that a distinction was at one time supposed to exist between a devise of a testator's estate or interest in his lands, and a devise of the lands themselves by that description; it being considered in the former case that the devise did not, in the latter that it did, express an intention by the force of the language itself, that the devisee was to take the lands discharged of the widow's right to dower. But I take the law to be clearly settled at this day, that a devise of lands, *eo nomine*, upon trust for sale, or a devise of lands, *eo nomine*, to a devisee beneficially, does not *per se* express an intention to devise the land otherwise than subject to its legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by

the widow of her dower by metes and bounds, or the devise standing alone will be construed as I have stated."

The Vice-Chancellor went on to say at p. 314: "The devise is of land subject to dower. The trust to sell is a trust to sell subject to dower, and the proceeds of the sale will represent the gross value of the estate *minus* the value of the dower."

Boyd C. in *Re Quimby; Quimby v. Quimby* (1884), 5 O.R. 738, decided that the widow was put to her election where there was a blended fund created and a direction that in case of the death of a son before he reached the age of 30 years the estate, after providing for her annuity, should be distributed according to the Statute of Distributions, on the ground that if the widow was allowed her dower it would interfere with the equality of distribution under the Statute of Distributions.

In *Amsden et al. v. Kyle et al.* (1885), 9 O.R. 439, Boyd C. held that where a testator by his will left all his real and personal estate to his nephew James Kyle "subject to the following bequest, viz., to my wife Eliza Kyle, a one-third interest in all my real and personal estate, so long as she shall remain unmarried", the widow was put to her election. The learned Chancellor stated:

"The devise of one-third of the testator's land during widowhood would not *per se* interfere with the widow's right as doweress to claim another third for life. But according to judicial determinations which bind me, a clue to the testator's intention is found in the direction to divide the personal as well as the real estate. He gives to his wife a one-third interest in all his real and personal estate as long as she shall remain unmarried. That imports the same manner of division in the case of the land as in the case of the personalty, *i.e.* a division of the entire property of each kind which would be defeated if the dower were first subtracted from the realty."

Leys v. The Toronto General Trusts Company (1892), 22 O.R. 603, is a case which emphasizes the distinction between a bequest to trustees to form a blended fund in which the widow is to participate with others in certain fixed proportions, and one in which she is merely to participate. The testator by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other

devisees and the division of the corpus was postponed until after the death of the wife. At p. 605 Boyd C. stated:

"The testator blends the real and personal estate not for the purpose of its equal division, but in order to obtain an income out of which payments are to be made annually to his wife and other objects of his bounty, and the residue of such income to go equally during the life of his wife to his nephews and nieces. The division of the *corpus* is not to be made till after the wife's death."

He distinguished that case from *Re Quimby; Quimby v. Quimby, supra*, where the blended estate was to be divided between the wife and others in equal proportions, and held that no election arose by virtue of this provision as between the wife's dower and the testamentary bestowments. The only reference that is made to *Amsden et al. v. Kyle et al.*, is to correct the first sentence above quoted. The learned Chancellor stated that he could not find any manuscript of the judgment to compare with the printed text, but as it stood it was misleading. He went on to say: "The devise of one-third for widowhood in one part, would not interfere with a claim for dower in another part, but it would be inconsistent with having the two estates in the same land concurrently."

In *Re George Shunk Estate* (1899), 31 O.R. 175, Rose J., after considering *Ellis v. Lewis*, *Amsden et al. v. Kyle et al.* and *Leys v. The Toronto General Trusts Company, supra*, stated at p. 179: "The authorities to which I have referred shew that a devise upon trust to sell does not put the widow to any election, and here there is nothing more."

In *Re Hurst* (1905), 11 O.L.R. 6, Chief Justice Meredith at p. 9 outlined the principles applicable in considering whether a widow was put to her election on the facts of the case as follows: "I am unable to find in the will of this testator, or to gather from the provisions of it that his intention was to dispose of his property in a manner inconsistent with his wife's rights to dower in the thirty-three acres devised to his son Egbert Francis [subject to the right of the widow to occupy the rooms in the dwelling house and to use the drive house], which is the test, as stated in *Parker v. Sowerby*, 1 Dr. 488 [61 E.R. 539]; 4 DeG. M. & G. 321 [43 E.R. 531]; or that the provisions of the will shew clearly and beyond reasonable doubt that it was

the positive intention of the testator, either clearly expressed or clearly to be implied to exclude his wife from dower, which is the test, according to the view of the Vice-Chancellor (Kindersley) in *Gibson v. Gibson* (1852), 1 Dr. 42 [61 E.R. 367], or that the provisions of the will 'raise a necessary implication that the gift is in substitution of dower,' which must be found in order to exclude the claim to dower, according to the statement of the law by Vice-Chancellor Stuart, in *Warburton [Warbuton] v. Warburton [Warbuton]* (1854), 2 Sm. & G. 163, at p. 165 [65 E.R. 349]."

In *Re Williamson* (1916), 11 O.W.N. 142, Middleton J. stated at p. 143: "The more recent cases establish the necessity for some clear indication that the wife is to be deprived of her dower if she takes under the will; neither a direction to sell and realise nor the formation of a blended fund is a sufficient indication of the testator's intention to deprive the wife of her right to dower if she accepts the benefits given by the will."

I have examined the will Middleton J. was construing and I find that there was a bequest to trustees of real and personal property to form a blended fund and provision was made for the testator's widow as follows: "Should the principal so invested amount to no more than fifty thousand dollars, to pay to my wife during her lifetime and provided she does not marry again the sum of one hundred and fifty dollars monthly. Should the amount invested be more than fifty thousand dollars then the income to my said wife is to be increased proportionately provided there is money to pay it." The residue passed on the death or remarriage of the widow to the testator's sons.

I would have had no difficulty in this case except for some language used by Orde J.A. and Roach J. in cases with which I now deal.

In *Re De Olloqui* (1927), 32 O.W.N. 299, Orde J.A. stated at p. 300: "Here the testator has blended the whole of his personality and realty into one mass and has given his wife an aliquot part or share of it, namely, one-third of the blended mass, and has then disposed of what is left. Where there is a gift to the widow of a proportionate share of both realty and personality, she must elect between the gift and her dower."

I am in entire agreement that the cases relied on are authority for this statement.

In *Re Hendry*, [1931] O.R. 448, [1931] 4 D.L.R. 908, Orde J.A., after considering many of the authorities to which I have referred, stated at p. 452:

"If the gift here were of some part of the corpus of the blended fund, the widow would clearly be put to her election under the authority of *Parker v. Sowerby* [(1854), 4 DeG. M. & G. 321, 43 E.R. 531], and of the four Ontario cases above mentioned [*McGregor v. McGregor* (1873), 20 Gr. 450; *Re Quimby*; *Quimby v. Quimby*, *supra*; *Amsden et al. v. Kyle et al.*, *supra*; *Re De Olloqui*, *supra*] which followed it. Does the fact that the wife is given merely one-third of the net income from the whole blended fund for her life or during widowhood, rather than a share of the fund itself, take the case out of the rule?

"Having regard to the rule itself, I am of the opinion that it does not. The testator blends the whole of his realty and personalty into one fund. Of the total net revenue derived from the whole fund one-third is to go to his widow. How can it be possible to carry out that intention if, before the creation of the blended fund, the widow is to take one-third of the realty by metes and bounds for her life, or its equivalent value in money? If she is to be permitted to do that, then the gift intended for her by the testator to be derived from the whole of his estate cannot possibly be carried out to the full. To the extent that she has asserted her right to dower, the net income available for distribution by the trustees is correspondingly reduced."

I am unable to find in any of the cases relied on any statement that goes so far as to say if the gift is of some part of the corpus of the blended fund the widow is clearly put to her election. In *Parker v. Sowerby*, *supra*, the Lord Chancellor at p. 325 stated: "It is not I think quite correct to state the general rule of law as being, that, to raise a case of election against the wife, the will must shew that the testator had in his mind her right to dower, and that he meant to exclude it; the rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with the wife's right to dower."

In *Re Williamson*, [1943] O.W.N. 270, [1943] 2 D.L.R. 726, affirmed without written reasons, [1943] O.W.N. 411, [1943] 3 D.L.R. 809, Roach J., after discussing several of the relevant cases, including the *Hendry* case, stated at p. 273:

"The fact that the testator does not confine such payments to income is important because if the gift is out of the corpus of the blended fund, the widow is put to her election. . . . To that extent the will contains a gift out of the corpus of the blended fund, and accordingly she is put to her election."

With the greatest respect, I cannot interpret the authorities in such a way as to warrant a statement of the applicable principle in the broad terms expressed by Orde J.A. in *Re Hendry* and Roach J. in *Re Williamson*. In the absence of written reasons in the latter case I do not think I am to assume that the Court of Appeal based its judgment on the statement I have quoted, thus overruling the decision of Middleton J. in the earlier *Williamson* case, *supra*. I think the fundamental principles to which I have referred are not to be departed from. The creation of the blended fund in which the widow is to share is not in itself evidence of an intention that the benefits under the will are to be in lieu of dower. It is only to be so taken if the benefits given to the widow under the will, together with her dower interest, would in some way defeat the intention of the testator as expressed in his will, *i.e.*, by cutting down the share of another beneficiary other than a residuary legatee, or giving the widow a greater share in the estate than on a true construction of the will the testator intended.

The law may be summed up in no better language than that used by the Master of the Rolls, Sir William Grant, in *Greatorex v. Cary* (1802), 6 Ves. 615, 31 E.R. 1223, where he said: "The question in all these cases is, whether the testator meant to give away his wife's dower; which he could not do directly. For that it must be seen clearly, that he meant to dispose so, that, if she should claim dower, it would disappoint the will. It must appear, that there is a repugnancy."

Sir William Grant stated that the case could not be distinguished from *Foster v. Cook* (1791), 3 Bro. C.C. 347, 29 E.R. 575. In that case the testator gave all his property to trustees and provided for an annuity for his wife. The Lord Chancellor stated at p. 351: "Then as to the other point, the wife has a charge upon the estate, paramount the will; she has an absolute right to the third part; it is not his to deprive her of it. But, here it is to be gathered from circumstances, that she is not to have it; and because he gives all *his* property to the trustees,

I am to gather from his having given all he *has*, that he has given that which he *had not*. So far from a declaration plain, I have nothing even to lead me to think he meant to deprive her of dower. She must, therefore, have her dower."

In the will before me the direction that the real property should be sold and out of the money realized a fund blended with personalty should be set up, out of the capital of which specific payments are to be made including an annuity to the widow at the rate of \$250 per month, all of which can be provided out of the testator's interest in the estate quite apart from the widow's dower interest, shows nothing inconsistent with the testator having recognized at the time the will was made that his widow should have that interest in his real estate given to her by law.

Questions 1 and 2 should be answered as follows:

1. The benefits given to Isabella Christina Hill are in addition to her dower interest.

2. Yes.

I have no doubt as to the disposition of the income of the estate. The testator is presumed to have intended to dispose of his whole estate and therefore the income, not having been specifically disposed of, falls into the residue. The answer to question 3 is "No", and the answer to question 4 is: The income falls into the residue of the estate and is to be distributed to the residuary beneficiaries according to the provisions of the will.

Costs of all parties out of the estate, those of the trustee on a solicitor and client basis.

Judgment accordingly.

Solicitors for the executor: Hughes, Agar, Amys & Steen, Toronto.

Solicitors for the widow: Briggs, Frost, Birks & Langdon, Toronto.

[ROBERTSON C.J.O.]

Re Glass.

Securities — Powers of Ontario Securities Commission — Appeals — What Questions Open on Appeal—What Orders, etc., Appealable—Refusal of Leave to Renew Application for Registration within Six Months—The Securities Act, R.S.O. 1950, c. 351, ss. 8, 9, 28, 29(1), 30(1).

The Ontario Securities Commission cancelled the registration of G., a broker-dealer, and he appealed. *Held*, the appeal must be dismissed. It was apparent that the Commission was of the opinion that statements made by the appellant in his advertising were not only misleading but intended to mislead, and that the circumstances prevented him from saying that they were isolated mistakes. It was impossible to say that the Commission, on the evidence before it, was wrong in these conclusions, or that, having reached these conclusions, it was wrong in its opinion that it was in the public interest that the registration should be cancelled.

Following this cancellation G. applied under s. 9 of The Securities Act for leave to make a new application for registration within six months, and this leave was refused. *Held*, there was no right of appeal from this refusal. The only right of appeal, under s. 30(1), was from a "direction, decision, order or ruling of the Commission" of the kind specified in s. 28, and this refusal did not come within that section. The matter of leave to apply again within six months was one for the Commission alone, without right of appeal to the Court.

AN APPEAL from two orders of the Ontario Securities Commission.

27th June 1951. The appeal was heard by ROBERTSON C.J.O.

A. G. Slaght, K.C., and *R. R. McMurtry, K.C.*, for the appellant.

J. D. Arnup, K.C., counsel designated by the Attorney-General to assist the Court.

3rd July 1951. ROBERTSON C.J.O.:—This is an appeal by Edward Albert Glass, a broker-dealer under the provisions of The Securities Act, R.S.O. 1950, c. 351, from the direction, decision, order or ruling of the Ontario Securities Commission, dated 20th April 1951, and from another direction, decision, order or ruling of the Commission made on the 17th May 1951.

There had been an investigation directed by the Commission, particularly concerning certain advertising over the name of the appellant in respect of a mining company, Indore Gold Mines Limited. As a consequence the chairman of the Commission had notified appellant's solicitor by letter that the question of the renewal of appellant's registration for the coming fiscal year would be reviewed by the full Commission. Indore Gold Mines

Limited was carrying on mining operations in the North-west Territories, and appellant had been active in selling the treasury shares of the company to the public. Appellant had published over his name in a mining journal an advertisement with respect to the shares of Indore Gold Mines Limited, that contained the statement: "Now shipping uranium ore." It would appear from the investigation directed by the Commission, and from the evidence before it, that the only uranium ore that had been shipped by the company was sent to the Department of Mines and Technical Surveys at Ottawa, receipt of which was acknowledged by a letter from the Chief of the Radioactivity Division in the following terms:

"We wish to advise you that we have now received your shipment of 24 bags of uranium ore comprising approximately 1680 pounds, from your Pitch property, Hottah Lake, N.W.T.

"This material was sent to us for concentration tests and work is being started on your sample at once."

In another advertisement of the shares of Indore Gold Mines Limited published by appellant reference was made to certain exploration and development work on the property of Indore Gold Mines Limited, in respect of which it was said that it had "uncovered immensely valuable deposits of gold also".

The renewal of appellant's registration came on for review by the full Commission in April 1951, when, after evidence had been taken, the Commission directed that the registration of E. A. Glass as a broker-dealer be cancelled, and notice of the Commission's decision and of the cancellation was sent under date of 20th April 1951.

From this decision and order of the Commission appeal is taken to this Court.

While it may be that the full case for the appellant was not presented to the Commission in its review of appellant's registration, that is not in any way chargeable to the Commission, nor does it form any proper ground of appeal from the Commission's action. The appellant's position on that review was not that he had other evidence that would justify his conduct. His plea, repeated throughout the review by the Commission, was that he was not a mining man and that inaccurate statements in his advertisements should, on that ground, be overlooked.

The duty of the Commission is defined in s. 8 of The Securities Act. It is as follows: "8. The Commission shall suspend or cancel any registration where in its opinion such action is in the public interest."

In my opinion the Court cannot interfere with the Commission's order made upon the review. It appears from the Commission's reasons for their decision that the Commission were of the opinion that the statement "Now shipping uranium ore" not only was a misleading statement, but that it was intended to mislead, and was used for that purpose. The Commission had also before them the statement about uncovering "immensely valuable deposits of gold", and they considered that it prevented the appellant from successfully pleading an isolated mistake.

It is impossible to say that upon the evidence before it, the Commission was wrong in these conclusions, and, having reached these conclusions, it is impossible to say that the Commission was wrong in its opinion that its action in cancelling the registration was in the public interest. For these reasons the first branch of the appeal fails.

The second branch of the appeal is from the Commission's decision or order made on the 17th May 1951, on appellant's application to the Commission under s. 9 of the statute, which is as follows:

"Notwithstanding any ruling of the Commission a further application for registration may be made upon new or other material or where it is clear that material circumstances have changed, provided that no further application for registration shall be made within six months of such ruling unless leave is first obtained from the Commission."

The Commission had made its order cancelling appellant's registration on 20th April 1951. He desired to make a further application based upon new and other material. This appears very plain from the memorandum of law and fact put in by counsel for the appellant on this appeal. On p. 8 of the memorandum the second paragraph is as follows:

"This application was made under Section 9 of the Act for leave to further apply for registration notwithstanding the ruling of the Commission on 20th April, 1951—'upon new or other material,' following the words of the statute."

The appellant was well aware that, by the express terms of s. 9, no further application for registration could be made by him within six months of the Commission's ruling, unless he first obtained leave from the Commission. Appellant's counsel, in argument, took pains to make it plain that the application on the 17th May 1951 was an application for leave under s. 9 of the statute, and that the Commission's order on that day was an order refusing leave.

Mr. Arnup's first answer to this appeal on the second branch was that no appeal lay from an order or ruling refusing leave to apply within the six months' period.

Part IV of The Securities Act deals with "Appeals" and is composed of ss. 28 to 32; s. 28 provides that:

"A notice of every direction, decision, order or ruling of the Commission,

"(a) granting or refusing to grant registration to or renewing, refusing to renew, suspending, cancelling or changing the registration of any person or company; or

"(b) regarding trading or the right to trade in securities or any conditions or restrictions relating thereto, shall be served upon the applicant or the person or company whose registration is thereby affected, and upon such other person or company as in the opinion of the Commission is primarily affected by the direction, decision, order or ruling, at the address appearing in the application or upon the records of the Commission."

Section 29(1) provides for the review by the Commission of any such direction, decision, order or ruling on the request of any person or company upon whom a notice is served under s. 28, or by any person who is primarily affected by any such direction, decision, order or ruling.

Section 30(1) gives a right of appeal to this Court, and is as follows: "Where the Commission has reviewed a direction, decision, order or ruling under section 29 any person or company upon whom a notice is served under subsection 5 of section 29 or any other person or company who is primarily affected by any such direction, decision, order or ruling or by the order made upon the review, may appeal to a justice of appeal of the Supreme Court."

Now, there has been only one order of cancellation by the Commission. That is the order of 20th April 1951. The appellant has had his appeal in respect of that order of cancellation. That is the appeal I have already dealt with. The second branch of the appeal is in respect of an order refusing an application for leave to bring the matter of appellant's registration again before the Commission within six months of the cancellation of 20th April. That is not a matter in respect of which the statute gives a right of appeal to this Court. It does not come within s. 28. The matter of leave to apply again within six months is a matter for the Commission, without appeal to this Court.

However strongly one might desire that the appellant should have every reasonable opportunity to present his full case in a matter of such vital importance to him, it is not the function of this Court to direct the members of the Commission how they shall administer their office, except where a clear right of appeal is given.

In the result the appeal fails upon both grounds of appeal and is dismissed.

Appeal dismissed.

Solicitors for the appellant: Slaght, McMurtry, Ganong, Keith & Slaght, Toronto.

[LEBEL J.]

Brown v. Hillar.

Deeds and Documents — Rectification — Necessity for Establishing Mutual Mistake — Heavy Burden of Proof — Inadmissibility of Evidence of Subsequent Conduct and Declarations of Parties.

There is a very heavy onus on a plaintiff who seeks to have a document varied on the strength of parol evidence alone. One who seeks rectification of a deed must prove not only that the deed does not contain the whole agreement between the parties to it but also that something was agreed upon that does not appear in the writing, and continued in the minds of both parties down to the time the agreement went into operation. And he must prove this by evidence so satisfactory as to leave no room for doubt. *Ship "M. F. Whalen" v. Pointe Anne Quarries Limited* (1921), 63 S.C.R. 109 at 126-7 (affirmed [1923] 1 D.L.R. 45); *McKay v. McKay* (1880), 31 U.C.C.P. 1 at 20, quoted and applied; *The King v. Thomas* (1948), 56 Man. R. 232; *Ferguson v. Winsor* (1884), 11 O.R. 88, referred to.

Although it is always proper in construing a contract to look at the circumstances surrounding its execution, subsequent declarations, showing what one or other party supposed to be the effect of the contract, are not admissible as an aid to its construction. *Lewis v. Nicholson et al.* (1852), 18 Q.B. 503 at 510; *Monro v. Taylor* (1848), 8 Hare 51 at 56, quoted and applied; 10 Halsbury, 2nd ed. 1933, p. 266, referred to.

AN ACTION for rectification of a deed of land.

23rd and 24th April 1951. The action was tried by LEBEL J. without a jury at Brockville.

W. M. Nickle, K.C., for the plaintiff.

J. R. Matheson, for the defendant.

10th July 1951. LEBEL J.:—On 24th September 1947 the plaintiff conveyed to the defendant certain farm lands in the township of Augusta in the county of Grenville and at the same time sold him certain implements and live stock, all for the sum of \$6,500. The plaintiff claims that there is a material mistake in the legal description. He says that the solicitor who prepared the deed should have excepted from the description a small portion of the lands, consisting of some three-quarters of an acre, which was referred to at the trial as "the Gallinger property". He asks therefore that the document be rectified to the end that this small parcel may be excepted from the description, together with two other small parcels which should also have been, but were not, excepted. On one of these is a church parsonage and on the other is a school. The defendant does not oppose the rectification of the document in so far as the last two parcels are concerned. He says that he well knew that the plaintiff was not the owner of

the school and the parsonage. But he does strenuously oppose any rectification which would have the effect of excluding the Gallinger property from the lands conveyed to him. As to this property he says there was no mutual mistake.

Upon the lands described in the deed are two houses, one on the larger part which is called the Seeley house and a smaller one on the Gallinger property. To distinguish them I shall refer to them by those names. Following the completion of the sale and until about 1st May 1948, pursuant to the agreement between the parties, the plaintiff and his wife remained on in occupation with the defendant of the Seeley house. There were also some tenants in that house for a time, and until 1st May 1948 there were other tenants in the Gallinger house.

Before saying more about the facts it will be convenient to consider the general principles of law applicable to a case of this kind. They are well settled and have been stated and restated in many cases, nowhere better or more succinctly than by Sir Lyman Duff, then Duff J., in *Ship "M. F. Whalen" v. Pointe Anne Quarries Limited* (1921), 63 S.C.R. 109 at 126-7, 63 D.L.R. 545, affirmed 39 T.L.R. 37, [1923] 1 D.L.R. 45. There he is reported to have said:

"Courts of equity . . . have from early times possessed and exercised authority to rectify documents in which parties have professed to express their contracts, a jurisdiction now exercisable by courts having equitable powers . . . an attempt to reform an instrument by invoking this equitable jurisdiction can only succeed where two conditions are fulfilled.

"First, it must be shown not only that the agreement as stated in the writing, . . . was not the whole of the agreement between the parties and it must further be shown that the parties did agree upon something which did not appear in the writing . . . and that the agreement, that is to say the intention to contract in this sense, continued concurrently in the minds of both parties down to the time the document went into operation. The other condition relates to the character and probative force of the evidence required. Where one of the parties denies the alleged variation the parol evidence of the other party is not sufficient to entitle the court to act. Such parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties satisfying the

court beyond reasonable doubt that the party resisting rectification did in truth enter into the agreement alleged. It is not sufficient that there should be a mere preponderance of probability; the case must be proved to a demonstration in the only sense in which in a court of law an issue of fact can be established to a demonstration, that is to say, the evidence must be so satisfactory as to leave no room for such doubt. *Hart v. Boutilier*, 56 D.L.R. 620 at page 630; *Fowler v. Fowler*, 4 DeG. & J. 250 at page 264 [45 E.R. 97]; *Clarke v. Joselin*, 16 O.R. 68 at page 78."

And in *McKay v. McKay* (1880), 31 U.C.C.P. 1, Osler J. in dealing with these principles, said at p. 20:

"A party seeking rectification from a Court of equity on the ground of mutual mistake must be able to shew by the clearest evidence—'irrefragable evidence,' to use Lord Thurlow's language—that neither of the parties intended the agreement to be such as the writing expresses it to be. It must also be shewn with equal clearness that there was another agreement assented to and concluded by both parties, which ought to be, by an amendment of the instrument, substituted for that which, in its unrectified form, it erroneously states: per Strong V.C. in *Campbell v. Edwards*, 24 Grant 152 at 171. And in *Fowler v. Fowler*, 4 DeG. & J. 250 at p. 264 [45 E.R. 97], Lord Chelmsford says: 'The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description.' "

Reference is also made to The Canadian Abridgment, vol. 15, cols. 602 *et seq.*, and the recent case, *The King v. Thomas*, 56 Man. R. 232, [1948] 2 W.W.R. 444, [1948] 4 D.L.R. 492; see also *Ferguson v. Winsor* (1884), 11 O.R. 88.

The defendant is a former Polish army officer. In the later stages of the last world war and until he arrived in Montreal in September 1947 and was demobilized there, he was a member of the British army. He earned distinction in the course of his military service, being awarded, among other decorations for

valour, the British Military Cross. He is a university graduate, and although he had a fair working knowledge of the English language when he came to Canada, he had no, or very little, knowledge of our habits, customs and business practices; and it must be assumed that at the trial he was better versed in our language than he was when he came to this country more than two years before.

The defendant wanted to purchase a farm in Ontario and the colonization branch of the Canadian Pacific Railway Company, which apparently supervised his immigration, took him in charge. Late in the afternoon of 23rd September one of the company's colonization agents, one John C. Robertson, drove him to the plaintiff's farm. They made no real inspection of the property or the chattels, being there but a short time before the plaintiff arrived home. A long discussion then followed in the plaintiff's house and eventually an agreement was reached which Robertson reduced to writing in his own hand. The parties signed it. It reads as follows:

"I hereby agree to sell my farm of 125 acres with buildings, including Stock and equipment as listed, for the sum of \$6,500, \$50.00 of which I am accepting tonight to bind the deal and balance of \$2,450 to be paid on completion of papers. I am to accept a mortgage for \$4,000 to run for ten years at 4% per annum.

"The purchaser also signs that he agrees to these terms."

The defendant swore that Robertson promised to return to the farm with him on the following day to make a detailed inspection of the land and the chattels but afterwards refused to do so. Instead he took the defendant to meet the plaintiff at Mr. A. C. Casselman's law office in Prescott. There in the presence of Robertson and the parties, Mr. Casselman prepared another short agreement which merely provided that the plaintiff was to be entitled to remain on in the Seeley house until 1st May 1948 and that a cow was to be excepted from the live-stock sold. The defendant did not wish to have the title searched—he said he could not afford it—but the parties went to the land registry office either while Mr. Casselman's secretary was typing the documents or later. They spoke to the registrar and looked at the books. The defendant said he wanted to know that the plaintiff was the owner of the farm and that there

were no encumbrances. He swore that he was there given to understand that the plaintiff owned the farm lands that the defendant was purchasing with the exception not only of the two small school and parsonage parcels I have mentioned, but of a third parcel, namely, "that piece of land formerly deeded to one Matthew Davis by one William Humphreys containing one quarter of an acre, more or less". This last parcel, so described, is properly excepted from the deed to the defendant, but it should be kept in mind. I think it is an important factor and I shall refer to it as "the Humphreys property".

To succeed in this action the plaintiff must discharge that very heavy burden which rests upon one who seeks to have a document varied on the strength of parol evidence alone. I am thoroughly satisfied that he has not done so. Before he is entitled to relief, not only must he prove that the deed does not contain the whole agreement between the parties, but he must also establish that something was agreed upon which does not appear in the writing and that that something, in the language of Sir Lyman Duff, "continued concurrently in the minds of both parties down to the time the document went into operation". And he must do so, again in the language of Sir Lyman, by evidence "so satisfactory as to leave no room for doubt".

In my opinion, and I so find, it was not until a few days after the closing of the sale that the defendant learned from the plaintiff that the latter claimed the Gallinger property. That happened while the two men were walking over the property together. I reject the plaintiff's testimony to the effect that during the negotiations on 23rd September 1947 the Gallinger house was discussed and that the defendant was told that it was to that house that the plaintiff intended to move on 1st May 1948, and I also find that the defendant was not informed in Mr. Casselman's office on the following day that the Gallinger property was not included in the lands sold. Mr. Casselman said that he had advised Mr. Robertson to that effect but the latter swore that he could not recall having been so informed. And Mr. Casselman admitted that he experienced difficulty in remembering just what had been said "back that far". Mr. Robertson was not the defendant's agent in any sense and if he was advised as Mr. Casselman thinks he was it is clear that the information was not passed on to the defendant. Had the defend-

ant been made aware beforehand of the alleged exception from the property, it is not improbable that he would have gone through with the deal, but one cannot say. And it may be significant to observe that after learning that the plaintiff insisted upon the exception, the defendant offered to reconvey the property in consideration of the return of his money, but his offer was refused.

At all events, I was most favourably impressed by the defendant's testimony and I prefer it wherever conflict exists between him and any other witness. Not only did he impress me as a very truthful person, but he seemed to have a clearer recollection of past events than the others, which is perhaps not surprising because, with the exception of the plaintiff, he was the person most interested. I should add that I am satisfied that Mr. Casselman did his best to recall and relate truthfully what took place in his office on 24th September 1947. However, as he said, he is an extremely busy man and I think I do him no injustice if I say that it would have been surprising to find that he professed to have retained all the important details of this transaction so long in his mind. As I have intimated, he did not claim that he had.

What I think happened is this: The exception of the Gallinger property was not made known to the defendant because it was thought to be unnecessary. He had not been taken around the farm and hence had not seen the part now in dispute, and since he was to get approximately 125 acres and the disputed part contained but three-quarters of an acre, why put difficulties in the way of the transaction? Unfortunately for the plaintiff, there was a misunderstanding between him and Mr. Casselman, for as the latter swore, he thought from his conversation with the plaintiff that the Humphreys property, excluded by the description in the deed to the defendant and in the mortgage back, was in fact the Gallinger property.

In his argument Mr. Nickle sought to make much out of the defendant's conduct and declarations following his purchase of the farm. For example, the defendant did not insure the Gallinger house and he allowed the plaintiff to continue to be

assessed as its owner and to pay the taxes on it. But he was under no obligation to insure and if the plaintiff insisted on paying the taxes, why not let him? Then again, in November 1947, during the course of a dispute between the men over another matter, the defendant wrote to the plaintiff and forbade him to do certain things under penalty of being evicted from the Seeley house which the men then shared together. He did not mention the Gallinger property in this letter and I do not know why he should have done so, even if he was then sure of his legal position with respect to that property, which he says he was not.

Lastly, an incident occurred in July 1950 upon which counsel for the plaintiff laid considerable stress. Mr. Bissell and Mr. Greer, assessors for the Township of Augusta, visited the defendant in July 1950 and asked him in whose name the disputed property should be assessed. They swore that he had told them that the land was his but that the house belonged to the plaintiff. They said that the defendant had produced his deed to confirm what he had said to them but they had not read it. If they had done so they would, of course, have seen for themselves to whom the lands should have been assessed. The defendant swore that he had never said any such thing and I gathered that he was convinced that they must have misunderstood him. I do not understand why the defendant would tell these two men that the Gallinger property was in dispute, as they said he did, and at the same time produce his deed for their inspection, unless he was seeking to convince them that the property was included in his deed. As I have said, the defendant's knowledge of our language is limited, and in my opinion, it would be unfair to hold that during that conversation he intentionally made a declaration against his own interest.

If there were anything of substance in the circumstances I have just related that assisted the plaintiff, and I think there is not, I would still be precluded from acting upon it, for the law as stated by Lord Campbell C.J. in *Lewis v. Nicholson et al.* (1852), 18 Q.B. 503 at 510, 118 E.R. 190, is:

"It is always legitimate to look at all the coexisting circumstances, in order to apply the language, and so to construe the

contract; but subsequent declarations, shewing what the party supposed to be the effect of the contract are not admissible to construe it."

And again it is as stated by Wigram V.C. in *Monro v. Taylor* (1948), 8 Hare 51 at 56, 68 E.R. 269: ". . . no point of law can I apprehend, be better settled than this: that, in construing the agreement, no acts of the parties subsequent to the making of it are (as such) admissible for the purpose of determining its meaning."

See also 10 Halsbury, 2nd ed. 1933, p. 266.

For the reasons given, the action fails and must be dismissed with costs. The counterclaim is also dismissed, but without costs. If reformation of the deed to the extent to which the defendant consents is desired, the judgment may so provide.

Judgment accordingly.

Solicitors for the plaintiff: Casselman & Beaumont, Prescott.

Solicitor for the defendant: John E. Matheson, Brockville.

[SPENCE J.]

**Re Newmarket Lumber Company, Limited;
International Wood Products Limited v. The Royal Bank of
Canada.**

*Banks and Banking—Loans—Effect of Security—Rights of Debtor's Landlord—Arrears of Rent Existing when Security Given—Distress—The Bank Act, 1944 (Can.), c. 30, ss. 88, 89(1)—The Landlord and Tenant Act, R.S.O. 1950, c. 199, s. 30(2).
Landlord and Tenant—Right to Distrain—Nature of Right—Time of Arising—Whether Right "in on, or in respect of" Goods in Demised Premises—The Landlord and Tenant Act, R.S.O. 1950, c. 199, s. 30(2)—The Bank Act, 1944 (Can.), c. 30, ss. 88, 89(1).*

The right of a landlord to distrain for arrears of rent is a right "in, on or in respect of" the goods subject to distress and, if the right arose (i.e., if there were arrears of rent in existence) prior to the giving of security to a bank under s. 88 of The Bank Act on the goods, or some of them, the landlord's right is not postponed to the bank's claim under s. 89(1) of the Act, but has priority over it by the operation of s. 30(2) of The Landlord and Tenant Act. *L'Expansion Jérômiennne Inc. v. Delma Plastics Ltd. et al.*, [1950] Que. S.C. 326; *Re Spivack and Ettenberg* (1927), 33 R. de Jur. 118, agreed with.

A MOTION for the determination of the rights of the parties.

25th June 1951. The motion was heard by SPENCE J. in Weekly Court at Toronto.

N. L. Mathews, K.C., and G. W. Gorrell, for International Wood Products Limited, applicant.

C. A. Thompson, K.C., for The Royal Bank of Canada, respondent.

24th August 1951. SPENCE J.:—This is an application under Rule 605 upon an agreed statement of facts for an order determining the rights of the applicant, International Wood Products Limited, and the respondent The Royal Bank of Canada in a fund of \$1,675 realized upon the sale of the inventory of Newmarket Lumber Company Limited. Although the agreed statement of facts is silent upon the topic, counsel have informed me that Newmarket Lumber Company Limited became bankrupt after the landlord had distrained. However, since the issue is only between the landlord and the bank and the trustee could in no event claim the fund for ordinary unsecured creditors he was not formally notified of the application and did not appear thereon.

The issue revealed by the agreed statement of facts may be summarized very shortly. At a time when Newmarket Lumber Company Limited owed large arrears of rental to the applicant under the lease which it held from the applicant the company

gave notice in approved form of its intention to give security to the bank under s. 88 of The Bank Act, now 1944 (Can.), 8 Geo. VI, c. 30, and immediately thereafter the tenant company gave the bank an assignment of its inventory pursuant to s. 98. On the 15th May 1950, when the goods subject to such security still remained on the premises leased in possession of the tenant, the landlord distrained on these and other goods for arrears of rent amounting to \$7,000. The landlord realized less than \$1,000 by the sale of goods other than those covered by the bank's security. The bank had advanced a total of \$9,250, all of which was still owing at the time of the distress and is still owing at the time of the application. By agreement the inventory subject to the security of the bank has been sold and has realized the sum of \$1,675, which is held by the bank subject to the order of the Court upon this application. The problem, therefore, under these circumstances is, has the landlord or the bank prior claim to such funds?

The Bank Act as enacted in R.S.C. 1927, c. 12, and re-enacted by 1934, c. 24, provided in s. 89(2) :

"89(2). All advances made on the security of any bill of lading or warehouse receipt, or of any security given under section eighty-eight of this Act, shall give to the bank making the advances a claim for the repayment of the advances on the products, goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor, but such preference shall not be given over the claim of any unpaid vendor who had a lien upon the products, goods, wares and merchandise at the time of the acquisition by the bank of such warehouse receipt, bill of lading, or security, unless the same was acquired without knowledge on the part of the bank of such lien."

It would appear that this section merely provided that the bank's claim for repayment should have priority over the claim of an unpaid vendor. Section 86(2) (a) of the said statute provided that a warehouse receipt acquired as collateral security should give to the bank all right and title to the said warehouse receipt and the goods covered by it, and s. 88(7) of the same statute provided that a security given to a bank under that section should give to the bank the same right and title as if it had acquired a warehouse receipt. Therefore, under the combined operation of these two sections, the bank simply became the

owner of the goods and had no special immunity, privilege or priority not possessed by other owners—subject however, to the priority over unpaid vendors conferred by s. 89(2): *City of Brantford v. Imperial Bank of Canada*, 65 O.L.R. 625, [1930] 4 D.L.R. 658, 12 C.B.R. 39. In *Re Spivack and Ettenberg* (1927), 33 R. de Jur. 118, Martin C.J. held that the landlord's privilege for the payment of his rent had priority over the claim of the bank. The learned judge in his reasons pointed out that such privilege was valid even against the goods of third persons being on the demised premises with their consent.

In Ontario the position of goods owned by third persons is dealt with in s. 30(2) of The Landlord and Tenant Act, now R.S.O. 1950, c. 199, where it is provided that the landlord shall not distrain upon the goods of any person except the tenant but that such restriction shall not apply in favour of a person deriving title from the tenant, whether by way of purchase, mortgage or otherwise. Therefore in Ontario if the provisions of The Bank Act as hereinbefore recited had remained unaltered, on the authority of *Re Spivack and Ettenberg*, *supra*, with which I agree, the landlord's distress would be valid even upon the goods covered by the bank's security and the landlord would be entitled to the fund realized from their sale.

But The Bank Act was re-enacted in 1944, and what appeared in the previous statutes as s. 89(2) is now enacted in this last statute as s. 89(1), in the following terms:

"All the rights and powers of the bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and those rights and powers of the bank in respect of the property covered by a security given to the bank under section eighty-eight of this Act which are the same as if the bank had acquired a warehouse receipt or bill of lading in which such property was described, shall, subject to the provisions of subsection four of section eighty-eight of this Act and of subsections two and three of this section, have priority over all rights subsequently acquired in, on or in respect of such property, and also over the claim of any unpaid vendor, but such priority shall not be given over the claim of any unpaid vendor who had a lien upon the property at the time of the acquisition by the bank of such warehouse receipt, bill of lading or security, unless the same was acquired without knowledge on the part of the bank of

such lien, and where security is given upon property under paragraph (g) of subsection one of the said section eighty-eight, such priority shall exist notwithstanding that such property is or becomes affixed to real or immovable property."

Counsel for the bank submits that this subsection goes much further than its predecessor to protect the position of the bank and that it protects the bank not only against the lien of the unpaid vendor but against "all rights subsequently acquired in, on or in respect of such property". He argues that the landlord had no right "in, on or in respect of such property" until it distrained on the 15th May 1950, and therefore the landlord's rights were subsequent to those of the bank acquired months before when it took the security, and that therefore under the section the landlord's rights are subject to the bank's priority. So it must be determined whether the landlord had any "rights in, on or in respect of" the property prior to the date of this distress.

It will be remembered that the tenant had been in arrear for rent long before the bank took this security under s. 88 of The Bank Act, and that therefore the landlord had, before such date, the right to distrain although it did not exercise that right until after the bank had taken this security.

What is the right to distrain? It has been held in a series of cases in England, Ontario and the western Provinces, that such a right is *not* a security held by the creditor in respect of the debt so that the creditor who by his own conduct lost the right to distrain could none the less claim against a guarantor or surety for the tenant: *In re Russell*; *Russell v. Shoolbred* (1885), 29 Ch. D. 254; *Boone v. Martin* (1920), 47 O.L.R. 205, 53 D.L.R. 25; *West v. Shun* (1915), 8 Sask. L.R. 243, 9 W.W.R. 644, 32 W.L.R. 961, 24 D.L.R. 813; *In re Hingston-Smith Arms Company, Limited and MacPherson Estate*, 34 Man. R. 312, [1924] 2 W.W.R. 1081, [1924] 3 D.L.R. 844, 5 C.B.R. 41. In each of the latter three cases the Court adopts the words of Fry L.J. in *In re Russell*, *supra*, at p. 265, in describing the right to distrain as "a particular remedy which arises on non-payment". If this definition is adopted then the right to distrain would appear to be a right "in, on or in respect of" the property, and since it arises on non-payment, it was in existence at the time the bank took the security and was not subsequent there-

to. So the right to distrain is not such a right as s. 89(1) of the present Bank Act postpones to the bank's claim.

Counsel for the bank cites *In re Winding-up Act and Jasper Liquor Company, Limited*; *Scott v. The North-West Trust Company* (1915), 9 Alta. L.R. 199, 9 W.W.R. 364, 32 W.L.R. 727, 25 D.L.R. 84, as an authority for the proposition that a right to distrain is of no effect in law until such right has been exercised. I have examined that decision and I think it can be taken only as having decided that distress after service of the petition in a winding-up matter, albeit prior to the order being made, is invalid.

It is true, as counsel contends, that a right to distrain is not a lien, but s. 89(1) of the present Bank Act does not refer to "liens" but rather to "rights in, on or in respect of such property".

The Superior Court of Quebec has come to the conclusion that s. 89(1) of The Bank Act, as it presently appears, has not affected the landlord's right to exercise a distress upon the goods held by the bank under s. 88 security, and gave to the landlord priority under circumstances very similar to those of the agreed statement of facts herein: *L'Expansion Jérômiennne Inc. v. Delma Plastics Ltd. et al.*, [1950] Que. S.C. 326, 31 C.B.R. 139, per Cousineau J. at 332-3.

I, therefore, have determined this application in favour of the contention of the applicant, the landlord. An order will issue declaring that the applicant is entitled to the fund in priority to the respondent. Since the fund is insufficient to cover the landlord's claim and since the parties agreed on a statement of facts for submission to the Court upon this application, the matter is not one upon which any order should be made as to costs.

Order accordingly.

Solicitors for the applicant: Mathews, Stiver, Lyons & Vale, Toronto.

Solicitors for the respondent: Aylesworth, Garden, Thompson & Stanbury, Toronto.

[COURT OF APPEAL.]

Re Miles; Steffler v. Miles.

Insurance—Life Insurance—Beneficiaries—Designation of Wife—Subsequent Annulment of Marriage for Impotence—Effect—The Insurance Act, R.S.O. 1950, c. 183, s. 169.

The word "divorced" in what is now s. 169(1) of The Insurance Act is not used in a narrow sense or with a limited meaning, but is intended to apply to any dissolution by law of the bond of matrimony. Using the word in this sense a wife who has obtained an annulment of her marriage on the ground of the husband's impotence is "divorced" within the meaning of the subsection, and her interest as beneficiary in a policy of insurance on his life thereupon passes to the insured or his estate.

Judgment of GALE J., *ante*, p. 1, reversed.

AN APPEAL by Elizabeth B. Miles from the judgment of Gale J., *ante*, p. 1, [1951] 2 D.L.R. 72.

26th April 1951. The appeal was heard by LAIDLAW, ROACH and MACKAY JJ.A.

M. Lerner, for the appellant: A "divorce" in the sense in which the word "divorced" is used in s. 169(1) of The Insurance Act, now R.S.O. 1950, c. 183, must include an annulment of marriage by reason of the impotence of one of the parties.

There is no question that the words "The Beneficiary Dorothy E. Miles, Wife of the Insured" in the policy described the respondent, but our submission is that as soon as the marriage was dissolved her interest ceased under s. 169(1).

Before the passage of The Divorce Act (Ontario), 1930 (Can.), c. 14, and The Divorce Jurisdiction Act, 1930 (Can.), c. 15, attempts were made in the Ontario Courts to obtain annulments of marriage, but they were always unsuccessful on the ground that the Courts had no jurisdiction. Section 91(26) of The British North America Act gave Parliament exclusive jurisdiction over "Marriage and Divorce", and there was no distinction between divorce and annulment. The inference is that divorce and annulment for impotence are synonymous. I refer to *H. v. H.*, [1933] O.W.N. 490, [1933] 3 D.L.R. 792; *Peppiatt v. Peppiatt* (1916), 36 O.L.R. 427, 30 D.L.R. 1; *Prowd v. Spence* (1913), 4 O.W.N. 998, 24 O.W.R. 329, 10 D.L.R. 215; *A. v. B.* (1911), 23 O.L.R. 261.

To "divorce" means to "dissolve a marriage", and since 1857 "divorce" has meant the dissolution of a valid marriage. Where one party to a marriage is impotent the marriage is not void *ab initio*, but merely voidable. "Divorce" being the dissolution

of a valid marriage, it must include dissolution by reason of impotence as well as dissolution on the ground of adultery. The jurisdiction in an action for annulment for impotence, as in one for dissolution of marriage, depends upon the domicile of the husband: *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29.

A statute should be reasonably interpreted, so as not to offend against common sense and equity: *Twycross v. Grant et al.* (1877), 2 C.P.D. 469. Some justification for giving an extended meaning to the word "divorced" may be found in s. 10 of The Interpretation Act, R.S.O. 1950, c. 184.

Even if s. 169(1) does not defeat the respondent's rights, she was at most an ordinary, rather than a preferred, beneficiary after the annulment, and had no right to apply for payment of the insurance moneys: *Deckert v. The Prudential Insurance Company of America*, [1943] O.R. 448, [1943] 3 D.L.R. 747, 10 I.L.R. 158, 211; *Tweddle v. Atkinson* (1861), 1 B. & S. 393, 121 E.R. 762. The law to be applied is that in force at the time of the insured's death, not that at the time of the application for payment. Section 161(2) of The Insurance Act was not enacted until 1946, c. 42, s. 6, and was not expressly made retroactive. [LAIDLAW J.A.: Although the respondent might not have been able to enforce her rights against the insurance company, would not the administratrix of the estate take the money impressed with a trust in her favour?] There was no moral justification for the application; the respondent was relying upon her strict legal position.

E. S. Livermore, K.C., for Dorothy Elizabeth Steffler, respondent: Following the annulment of the marriage, and because of the failure of the insured to make a written declaration of a change of beneficiary, the respondent became an ordinary beneficiary, and on the insured's death she was entitled to the proceeds of the policy.

The word "divorce" as used in The Insurance Act must be interpreted as meaning only the dissolution of a marriage by reason of a matrimonial offence, and not as including an annulment. It is only the word "divorced" that is used in s. 169(1), not some such phrase as "divorced or annulled". The situation deals only with the situation where a wife, having been named as beneficiary, is divorced, and it does not purport to deprive a wife of her interest in a policy where the marriage is annulled.

I refer to *Fleming v. Fleming et al.*, [1934] O.R. 588, [1934] 4 D.L.R. 90; *Leib v. Leib* (1908), 1 Sask. L.R. 363, 7 W.L.R. 824. *M. Lerner*, in reply.

Cur. adv. vult.

4th September 1951. The judgment of the Court was delivered by

LAILAW J.A.: This is an appeal by Elizabeth Bell Miles, widow of the late Ross G. Miles, in her personal capacity and also in her capacity as administratrix of the estate of her late husband, from an order made by Mr. Justice Gale on the 11th December 1950, upon an application by way of originating notice of motion.

The learned judge in the court below directed that the proceeds of a certain policy of insurance on the life of the late Ross G. Miles, paid into court by The London Life Insurance Company, be paid out to the applicant Dorothy Elizabeth Steffler, who was the wife of the deceased at the date of the issue of the policy of insurance, but who subsequently obtained a decree absolute dissolving her marriage with the deceased.

The respondent was married to the late Ross G. Miles on the 12th December 1936. He effected a policy of insurance on his life on or about the 17th June 1937, and designated therein "The Beneficiary Dorothy E. Miles, Wife of the Insured". On the 20th May 1943 a judgment nisi was pronounced whereby the marriage between the respondent and the late Ross Glenwood Miles was dissolved upon the ground that the marriage was never legally consummated, and that the said Ross Glenwood Miles was physically incompetent to consummate the said marriage with the respondent. The judgment nisi was made absolute by an order of the late Mr. Justice McFarland dated the 28th January 1944. On the 15th February 1945 the insured Ross G. Miles was remarried to the appellant Elizabeth Bell Miles. The insured died on the 7th December 1945. On the 27th August 1948 the respondent was remarried to one Steffler. Claims were made to the proceeds of the insurance policy by both the appellant and the respondent and the insurance company, The London Life Insurance Company, paid the proceeds into court pursuant to an order of King J. dated 6th May 1950.

The learned judge in the court below, with his usual great care and ability, considered the provisions of s. 161(1) of The Insurance Act, R.S.O. 1937, c. 256 (now s. 169(1) of R.S.O. 1950, c. 183)*, and the arguments of counsel as to the meaning and effect of those provisions. It appears to me that the single question for determination of the Court is simply this: What is the meaning of the word "divorced" as used in s. 169 of The Insurance Act? The word means the same now as it did when it was first used in the section from which the present one has its source. It appears in s. 143 of 1924 (Ont.), c. 50, and subsequently in s. 149 of R.S.O. 1927, c. 222, and s. 161 of R.S.O. 1937, c. 256. In 1924 the Legislature of this Province undoubtedly recognized that the subject of marriage and divorce was one falling within the exclusive legislative jurisdiction of the Parliament of Canada. The Courts of this Province had no power at that time to grant a decree of divorce. It was not until 1930 that such jurisdiction was acquired by virtue of an Act of the Parliament of Canada "to provide in the Province of Ontario for the dissolution and the annulment of marriage", 1930, c. 14; see also 1930 (Can.), c. 15. I cannot see that the distinction emphasized by counsel for the respondent between an action for "dissolution" of marriage and an action for "annulment" of marriage, or the difference in practice and procedure between those actions as created and existing subsequent to 1924, when the section of legislation now under consideration was first enacted, assists the Court in any way to obtain the intention of the legislation and the meaning of the word "divorced" as used at that time. I think the word is not used in the enactment under consideration in a narrow sense or with a limited meaning. It was not intended in the legislation to distinguish between an action for dissolution of marriage founded upon the ground of adultery of one of the parties to the marriage contract, and one founded upon non-consummation of the marriage because of physical incompetency of one of the parties. It was not intended to make the legislation applicable to the one class of case and not to the other. I think the word "divorced" in s. 169(1), and as

*This subsection reads as follows:

"Where the wife or husband of the person whose life is insured is designated as beneficiary, and is subsequently divorced, all interest of the beneficiary under the policy shall pass to the insured or his estate, unless such beneficiary is a beneficiary for value, or an assignee for value."

it appeared in s. 143 of the 1924 statute, was intended to apply in the larger sense to all actions for dissolution of marriage, whether based upon grounds existing at the time of the marriage or because of events subsequent thereto. It was intended to mean the dissolution by law of the bond of matrimony. In that sense the respondent was divorced by the order of Mr. Justice McFarland dated the 28th January 1944 within the meaning and intention of the provisions of s. 169(1) of The Insurance Act.

My opinion is, therefore, that all the interest of the respondent in the policy of insurance described on the life of the late Ross Glenwood Miles, in which she was designated as beneficiary, passes to the estate of the late Ross Glenwood Miles and should be paid out of court to the appellant in her capacity as administratrix of the estate.

This appeal should be allowed. The order of Mr. Justice Gale in appeal should be set aside. In place thereof it should be ordered that the proceeds of policy number 305573N of The London Life Insurance Company paid into court pursuant to the order of Mr. Justice King dated the 6th May 1950 be paid out to Elizabeth Bell Miles, administratrix of the estate of the late Ross Glenwood Miles.

The costs of the respondent in this court should be allowed in the sum of \$50 and the same amount in the court below should be allowed to her. Both amounts should be paid by the appellant to the respondent out of the proceeds of the said policy of insurance number 305573N now in court.

Appeal allowed.

Solicitors for the applicant, respondent: Ivey & Livermore, London.

Solicitors for the appellant: Lerner & Lerner, London.

[GALE J.]

Giffels & Vallet of Canada, Ltd. v. The King ex rel. Miller.

Architects — Unauthorized Practice — Incorporated Company — Powers under Charter — The Architects Act, R.S.O. 1950, c. 21, s. 18 — Whether “person” Includes Corporation — The Interpretation Act, R.S.O. 1950, c. 184, s. 31 (ze).

Subsections 1 and 2 of s. 18 of The Architects Act, which prohibit practising or holding oneself out as an architect by any “person” not a member of or licensed by the Ontario Association of Architects, have no application to an incorporated company, and the word “person” as used in the subsections does not extend to such a company. The prohibition is clearly meant to apply only to entities capable of being members of the Association, which a corporation cannot be, and accordingly the context requires a construction contrary to s. 31(ze) of The Interpretation Act. *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited* (1880), 5 App. Cas. 857; *Law Society v. United Service Bureau, Limited*, [1934] 1 K.B. 343, applied.

AN APPEAL by way of stated case.

19th, 20th and 25th June 1951. The appeal was heard by GALE J. in chambers at Toronto.

A. R. Jessup, for the appellant.

A. L. Fleming, K.C., and Meredith Fleming, for the informant, respondent.

4th September 1951. GALE J.:—This is an appeal by way of a case stated by Angus W. MacMillan, Esquire, a magistrate for the city of Windsor. On the 13th January last an information was laid by the above-named John D. Miller charging that the above-mentioned Giffels & Vallet of Canada, Ltd. (which I shall refer to hereafter as “the Company”) at the city of Windsor, “not being a member of the Ontario Association of Architects or licensed by it, did on or about the 21st day of July, 1950, hold itself out as an architect by preparing or offering to prepare for a fee, commission or other remuneration, a sketch, drawing or specification for an addition to the John McRae School, a work to cost more than Five Thousand Dollars (\$5,000.00), contrary to the provisions of the Architects Act, R.S.O. 1950, Chapter 21”. When the matter came on for hearing it became apparent that the constitutionality of The Architects Act was to be challenged and an adjournment was accordingly granted so that notice could be given to the Attorney General of Canada and the Attorney-General for Ontario. That was done but each Attorney-General indicated that he did not wish to appear or to be represented before the magistrate. The charge was then heard

and the Company was found guilty of the offence but at the request of its counsel the magistrate stated the following case:

"It was shown before me that Giffels & Vallet of Canada, Ltd. offered to prepare, and subsequently did prepare, for a fee, sketches, drawings and specifications for an addition to the John McRae School, a work to cost more than Five Thousand Dollars.

"The said offer was made, and the said sketches, drawings and specifications were prepared, on behalf of the accused corporation and for a fee payable to it, by its Vice-President and General Manager, in person, Mr. J. E. Trace, who was a member of the Ontario Association of Architects.

"Giffels & Vallet of Canada, Ltd. was not a member of, or licensed by, the Ontario Association of Architects. Counsel for the Association admits that a corporation could not be a member of or obtain a license from the Association.

"Giffels & Vallet of Canada, Ltd. is a firm of Engineers with offices at the City of Windsor but is not itself a member of or licensed by the Association of Professional Engineers of Ontario.

"As appears from its Letters Patent, Giffels & Vallet of Canada, Ltd. was incorporated October 31st, 1949, under Part I of The Companies Act, Statutes of Canada, 1934, Chapter 33, with all the rights and powers given by the said Act, and for the following purposes and objects:

"“(a) To buy, sell, import, export, manufacture, assemble, produce, deliver, install, construct, operate, service, supervise, guarantee, store, use, lease, hire, exchange or otherwise deal in any way or manner whatsoever in any and all kinds of engineering equipment, electrical, mechanical, metallurgical, chemical and hydraulic machinery, apparatus and appliances of all kinds, and any and all kinds and descriptions of devices, parts, supplies, implements or accessories pertaining thereto; to purchase, design, plan, build, erect, construct, demolish, alter, repair, lease or otherwise acquire, maintain, operate and manage buildings, structures, plants, factories, mills, foundries, engine houses, machine shops, offices, stores, depots, storehouses, warehouses, wharves, piers, docks, dockyards, slips, basins, terminals, vessels, ships, tugs, dredges, and other incidental structures and erections, plant and equipment of all kinds; to manufacture, produce, make, devise, alter, rent, license, sell, import, export, purchase, lease, hire and deal in designs, plans and specifications

for machines, implements, accessories, equipment, improvements, apparatus, supplies, appliances and processes devised to create, aid, alter or vary methods of manufacturing and producing articles and things of every kind and nature whatsoever.

“(b) For the better carrying out of the purposes of the Company:—

“1. To engage and utilize the services of architects and of electrical, mechanical, metallurgical, chemical and hydraulic engineers;

“2. To provide, supply or procure any assistance or services of a professional, industrial, commercial, financial or any other character to or for any person, company, directly or indirectly engaged or interested in the production, manufacture, sale, purchase, handling or use of any or all of the products of the Company;

“3. To engage in and carry on all or any of the businesses of general contractors and builders for and in the construction, erection, repair, alteration, maintenance and/or operation of public and private works of whatsoever nature or kind.’

“Subject to comment as to its irrelevancy by counsel for the accused, counsel for the complainant filed an exemplified copy of the Application for Incorporation of the accused corporation in which the applicants state that the purposes for which incorporation of the proposed company is sought are:

“To engage in and carry on all or any of the businesses of general contractors, engineers, architects and builders for and in the construction, erection, repair, alteration, maintenance and/or operation of public and private works of whatsoever nature or kind and to perform electrical, mechanical, metallurgical, chemical and hydraulic engineering and architectural work including the preparation of plans and specifications and expert work as acting consulting and superintending engineers and architects.’

“Counsel for the said Giffels & Vallet of Canada, Ltd. desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the questions submitted for the judgment of this Honourable Court being:

“1. Was I correct in holding that, as it applies to a corporation incorporated under The Companies Act, Statutes of Canada, 1934, Chapter 33, even though it may have express powers to

plan and design buildings and structures, section 18 of The Architects Act, R.S.O. 1950, Chapter 21, is not *ultra vires* the Legislature of the Province of Ontario?

"2. Was I correct in holding that the word 'person' in subsections 1 and 2, section 18, of The Architects Act, R.S.O. 1950, Chapter 21, includes a corporation?

"3. Was I correct in holding that the acts of an employee of a corporation in the course of his employment, in preparing or offering to prepare on behalf of the employer for a fee payable to it, a sketch, drawing or specification, for an addition to a building structure, whether or not such employee is a member of the Ontario Association of Architects, are acts whereby the employer corporation shall be deemed to hold itself out as an architect within the meaning of subsections 1 and 2, section 18, of The Architects Act, R.S.O. 1950, Chapter 21?

"4. Was I correct in holding the Information herein was not void for duplicity?"

Again, though duly notified of the appeal, neither Attorney-General took part in the proceedings before me.

After argument opened I raised two matters. As a result, counsel for the Company abandoned his appeal with respect to question 4 above, and asked that I should not deal with it, and the form of questions 1, 2 and 3 was amended. When the case was first stated all three questions made reference only to subs. 2 of s. 18 of the Act. Counsel agreed that such wording might seriously impair a complete consideration of the points on which answers were being sought, and accordingly they reattended before the magistrate, who altered the questions to read as I have set them out above.

Before addressing myself to the actual questions, it might be in order to make some reference to the provisions of the Act which will have to be examined with care later on. The predecessor of our present Architects Act was first passed in 1890 as 53 Vic., c. 41. It was entitled "An Act respecting the Profession of Architects" and the operative sections were prefaced by this preamble:

"WHEREAS it is deemed expedient for the better protection of the public interests in the erection of public and private buildings in the Province of Ontario, and in order to enable persons requiring professional aid in architecture to distinguish between

qualified and unqualified architects, and to ensure a standard of efficiency in the persons practising the profession of architecture in the Province, and for the furtherance and advancement of the art of architecture;

"Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—"

The Act itself then proceeded to give statutory recognition to or perhaps to create "The Ontario Association of Architects" and to set out how a person might become qualified to be a member in it. Section 25 of that Act is of interest. It reads as follows:

"25. From and after the first day of July, 1890, no person shall be entitled to take or use the name or title of 'Registered Architect,' either alone or in combination with any other word or words, or any name, title, or description, implying that he is registered under this Act, unless he be so registered. Any person, who, after the above date, not being registered under this Act, takes or uses any such name, title, or description, as aforesaid, shall be liable, on summary conviction, to a fine not exceeding \$25 for the first offence, and not exceeding \$100 for each subsequent offence."

The Act has been altered from time to time since 1890 but the provisions of s. 25 above were not substantially changed (provision was made for the term "landscape architect" and for "student associates" and "honorary members") until 1938, c. 47, when the prohibitive section was put into its present form, which is as follows:

"18.—(1) Every person who, not being a member of the Association, or who, having been a member, has had his membership cancelled or is under suspension, or who not being licensed under section 8, applies to himself the term 'architect' alone or in combination with any other term, or who holds himself out as an architect, shall be guilty of an offence and on summary conviction shall be liable to a penalty of not more than \$100 for a first offence, and upon conviction of a subsequent offence, a penalty of not less than \$300 and not more than \$500 or imprisonment for a period not exceeding three months, or both.

“(2) Without restricting the generality of the foregoing, any person who prepares or offers to prepare for a fee, commission or other remuneration any sketch, drawing or specification for any proposed building structure or for any structural alteration of or addition to an existing building structure, when such proposed work is to cost more than \$5,000, shall be deemed to hold himself out as an architect.

“(3) Nothing in this Act shall prevent or be deemed to prevent,

“(a) any person from performing his duties in His Majesty’s naval, military or aerial service;

“(b) any member or licensee of the Association of Professional Engineers of the Province of Ontario under *The Professional Engineers Act* or any employee or person working under the responsibility of such member or licensee, from performing architectural services in the course of any work undertaken or proposed to be undertaken by such member or licensee as an engineer;

“(c) any person from preparing a sketch, drawing or specification for any structure in, upon or pertaining to a mining property, or any alteration of or addition to an existing structure in, upon or pertaining to a mining property;

“(d) a *bona fide* member of an architect’s staff from preparing a sketch, drawing or specification in the course of his employment under the supervision of the architect;

“(e) a *bona fide* building contractor or a *bona fide* member of his staff domiciled in Ontario from preparing a sketch, drawing or specification for his own use as a building contractor in the construction or alteration by himself, or tradesmen employed by him, of any building structure, whether the same be proceeded with or not, and obtaining remuneration therefor;

“(f) any person from preparing any sketch, drawing or specification for interior decorations or the installation in the interior of a structure, of fixtures, non-bearing partitions or equipment where the structural alterations involved do not raise considerations of strength or safety;

“(g) any person from using the term ‘Landscape Architect’;

“(h) any person in the course of his employment under the supervision of or in conjunction with an architect from preparing

a sketch, drawing or specification for work to be undertaken by his employer;

“(i) any person, firm or corporation engaged in the business of selling pre-fabricated building structures from furnishing such drawings, diagrams and directions as are required for the assembling and erection of such structures.

“(4) Associates, student associates and honorary members shall not be deemed to be members of the Association within the meaning of this section unless and until admitted to membership pursuant to section 6, 7 or 8, provided that an honorary member or associate who has at some time been a member of the Association may continue to apply to himself the term ‘architect’, but may not practise architecture.”

Turning now to the questions asked by the learned magistrate in the order in which they were asked, I can say at once that, as it is phrased, I have no hesitation whatever in giving an affirmative answer to question 1. Quite apart from all other considerations, it is manifest that, in view of the provisions of clauses *b*, *e*, *f* and *i* of subs. 3, s. 18 above is not *ultra vires* with respect to a company incorporated under the Dominion Companies Act merely because that company has “express powers to plan and design buildings and structures”. For example, the section would not apply to a “Dominion company” incorporated to function as a building contractor which is granted ancillary authority to furnish architectural services. Mr. Jessup invited me to consider this question on the basis that it had reference only to this company, but I decline to do so. The question was framed by counsel after due collaboration with and consideration by the magistrate and it would be quite improper for me at this stage to attempt to answer a question which differs entirely from that which comes before the Court. I cannot speculate as to what form such a question might have taken. In addition, Mr. Fleming rightly did not prepare himself to discuss any problem other than that contained in question 1. Accordingly, I am not willing to consider matters which are not involved in the solution to the first question and, for the reason I have already stated, it must be answered in the affirmative.

Question 2 presents grave difficulties. It is conceded by everyone that an incorporated company cannot become a member or be licensed by the Ontario Association of Architects; the qualifi-

cations for membership set out in s. 7 of the present Act preclude companies from enjoying that privilege. It is Mr. Fleming's contention, however, that while the word "persons" to be found in s. 6, the word "applicant" in s. 7, and the word "person" in s. 8, do not extend to a body corporate, the word "person" in subss. 1 and 2 of s. 18 does because of the effect of s. 31(*ze*) of The Interpretation Act, R.S.O. 1950, c. 184, which provides that in every Act, unless the context otherwise requires, the term "person" includes any body corporate or politic. Counsel for the Company, on the other hand, argues that The Architects Act has nothing whatever to do with corporations. My problem, therefore, is to decide, (a) whether there is something in the context of the Act or of s. 18 which requires a corporation to be excluded from the operation of subss. 1 and 2 of s. 18, and (b) if so, whether such exclusion would violate the manifest or at least apparent object of the legislation. The question is a most troublesome one but after giving it the best judgment of which I am capable, I have come to the conclusion that the word "person" in subss. 1 and 2 of s. 18 does not extend to a body corporate.

In the first place, it is my view that the fabric of the whole Act compels one to regard the word "person" in the two subsections being examined as something other than an incorporated company. They appear to deal only with those entities which are capable of being members in the Association and since it is agreed that a corporation cannot become a member, then it is my opinion that a corporation is not subject to their terms. My decision in this respect is supported and perhaps dictated by two impressive judgments in England.

The first case I have in mind is that of *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited* (1880), 5 App. Cas. 857, a decision of the House of Lords. While the statutory background there being considered was somewhat different from that which I have before me, the principles laid down have a direct bearing upon the answer to the second question. At p. 862 of the report the Lord Chancellor, Lord Selborne, expresses what has since become a well-recognized and oft-accepted rule as follows:

"I think the principle laid down by the junior counsel for the Respondents was substantially right; that if a statute pro-

vides that no person shall do a particular act except on a particular condition, it is, *prima facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called 'persons' in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever."

That passage is high authority for what I have in mind.

Mr. Fleming contended that if counsel for the company were correct in his suggestion as to the applicability of the *Pharmaceutical Society* case, it would of necessity mean that any individual who could not qualify for membership in the Association would be outside the penal provisions of s. 18. I do not understand Lord Selborne's language to leave any such opening because he carefully confines the area of inapplicability of the Act which he is studying to persons in law who would have no capacity to become eligible for membership "at any time, by any means, or under any circumstances, whatsoever". Unless the individual can bring himself within the conditions there prescribed by Lord Selborne, he is always subject to the prohibitive provisions of s. 18. A body corporate can never under any circumstances become qualified under our present Act and is, therefore, following the reasoning of the learned Lord Chancellor, not included in the word "person" where that word appears in the penal provisions of the Act.

To the same effect is the language of Lord Blackburn where at p. 871 he says:

"The Act then goes on, in the 1st section, which is I think really very important, to say that 'it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of 'chemist and druggist', or chemist or druggist, or pharmacist or dispensing chemist or druggist, in any part of *Great Britain*, unless such person shall be a pharmaceutical chemist, or a chemist and druggist.' Now, my Lords, standing there, it does seem to me, though without laying down any technical rule, that the plain meaning of the words is, and they are used in this sense—such a person as could become a pharmaceutical chemist. A cor-

poration could not; an individual can. It seems to me, therefore, that the Act plainly says in the 1st section, 'It shall be unlawful to sell or keep open shop or assume the name of a chemist or druggist for any person,' that is to say, any natural person, 'unless he beomes a pharmaceutical chemist.' "

That principle was more recently reaffirmed and applied by a Divisional Court in England in the case of *Law Society v. United Service Bureau, Limited*, [1934] 1 K.B. 343. It will be seen that the section claimed to have been infringed had substantially the same effect as s. 18 and yet the Court held without hint of hesitation that The Solicitors Act had nothing whatever to do with corporations. The pith of Mr. Justice Avory's judgment is to be found in this passage at p. 348:

"Applying the principle there laid down [in the *Pharmaceutical Society* case], it seems to me that s. 46 of the Solicitors Act, 1932, must be held to contemplate a person who can have in force a practising certificate as a solicitor. By s. 43 the possession of such a certificate is an essential condition to the qualification of any one to act as a solicitor. A person not so qualified is referred to as an 'unqualified person.' It is clear beyond possibility of argument that a corporate body cannot pass the final examination provided for by the Act and, therefore, cannot apply to be admitted as a solicitor, or be so admitted, within s. 3 of the Act. Being incapable of being admitted as a solicitor, a corporate body, it is obvious, cannot be qualified under s. 43 and cannot have in force the practising certificate mentioned in s. 46. In my opinion, therefore, the respondent company in this case cannot be brought within the words 'any person' in s. 46."

Mr. Justice Charles at p. 351 says this:

"It is abundantly clear that a corporate body is not and never has been regarded as being capable of possessing a practising certificate or of being admitted as a solicitor. I think, therefore, that s. 46 [providing that 'Any person, not having in force a practising certificate, who wilfully pretends to be . . . qualified . . . to act as a solicitor' shall be liable to a penalty] refers, not to a body corporate, but to a person who is capable of being admitted to the ranks of solicitors by the Master of the Rolls under s. 3 and of acting as a solicitor if he takes out a practising certificate."

For these reasons I am satisfied that the provisions of the Act which deny corporations the right of qualifying for membership in the Association require that the word "person" in subss. 1 and 2 of s. 18 shall be interpreted as referring only to natural persons.

Before departing from a discussion of those two English decisions, I should perhaps point out that when s. 18 was amended in 1938 the Legislature may be assumed to have known that in England The Pharmaceutical Act and The Solicitors Act had been given the judicial interpretation above mentioned and must, therefore, have intended that the section then being passed was to bear the same construction. This observation is particularly apt in view of the fact that in 1934, by 24 and 25 Geo. V, c. 45, and presumably because of the decision in the *Law Society* case, the English Act was expanded so as expressly to prohibit any conduct on the part of a body corporate such as might imply that it was empowered to act as a solicitor.

While it is quite true that a word may have different meanings in the same statute or even in the same section, it is not to be forgotten that the first inference is that a word carries the same connotation in all places where it is found in a statute: see *In re National Savings Bank Association* (1866), L.R. 1 Ch. 547, and Maxwell on The Interpretation of Statutes, 9th ed. 1946, pp. 332-3, where it is said:

"It has been justly remarked that, when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act."

If Mr. Fleming's contention were to prevail the result would be that the word "person" in subss. 1 and 2 of s. 18 refers to a corporation, but that the word does not have that meaning where it is used in subs. 3, clauses *a*, *h* and *i*, of the same section.

Counsel for the Company placed great reliance upon the inclusion of the word "corporation" in subs. 3(*i*), and I must confess that it is a factor which is to be given some weight. As is stated in Maxwell, *op. cit.*, at pp. 330-2:

"When two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one . . .

“In the same way, although the word ‘person’, in the abstract, includes artificial persons, that is, corporations, the Statute of Uses (27 Hen. VIII, c. 10), which enacted that when a ‘person’ stood seised of tenements to the use of another ‘person or body corporate’, the latter ‘person or body’ should be deemed to be seised of them, was understood as using the word ‘person’ in the former part of the sentence as not including a body corporate. Consequently, the statute did not apply where the legal seisin was in a corporation. The same construction was given, for the same reason, to the same word in the Charitable Uses Act, 1735 (c. 36).”

Thus it may be supposed that the authors of this statute deliberately distinguished between natural persons and corporations, and, that being so, that the word “person” in subss. 1 and 2 of s. 18 was not intended by them to have the wider effect.

Mr. Fleming countered by pointing out that if counsel for the Company were right in his submission, then it was quite unnecessary for the Legislature to differentiate between “person” and “corporation” in subs. 3(i). I agree that generally any law-making body may be taken to assign force to each word used in its enactments, but this negative approach cannot overcome the opposing submission that by introducing both words the Legislature advisedly drew attention to the fact that the term “person” was not to include a body corporate.

There is still another principle which supports my decision and it is this. As is pointed out at p. 298 of Maxwell, *op. cit.*, statutes which create a monopoly or bestow exceptional exemptions and privileges correlatively infringing on general rights are subject to the well-known doctrine of strict construction directed to penal laws. That rule is acknowledged by Lord Selborne in the *Pharmaceutical Society* case, *supra*, where, at p. 867, he says: “My Lords, I said at the beginning that I did not regard this matter as free from difficulty, but in such a question of construction, it does seem to me to be best to remember the principle, that the liberty of the subject ought not to be held to be abridged any farther than the words of the statute, considered with a proper regard to its objects, may require.” The rule is recognized in another aspect by my brother Ferguson in *Re LeSieur*, [1951] O.W.N. 186 at 191, [1951] 2 D.L.R. 775.

Mr. Fleming strongly urged that the interpretation I put on s. 18 would do violence to the purpose of the Legislature in passing the Act. Let me say at once that I have no settled conclusion as to just what was intended by the Legislature with respect to corporations. For the reasons I have already outlined, I cannot state with any confidence that its aim was to prohibit the formation of companies which might render architectural services through the medium of employees who were members of the association. It is admitted on both sides that if the work was performed by employees who were either not members of the Association or within any of the exempting clauses of s. 18(3), those persons would be liable to punishment and, that being so, it strikes me that the public interest is thereby fully protected. Mr. Fleming suggested that the evil sought to be cured by the Act would remain if corporations were not made to bow to the provisions of s. 18 since they might irregularly and unlawfully hold themselves out as capable of furnishing architectural services and yet be free from the rigours of the discipline which normally faces an individual if he either is not a member of the Association, or, being a member, misconducts himself. That may be true, and if it is, then I can only conclude that the Legislature inadvertently overlooked such a possibility. In this regard I call attention to the following passages to be found in the *Law Society case, supra*.

Charles J. at p. 352 says: "It may be that this is *casus omissus* and that Parliament did not envisage a body corporate assuming to act as a solicitor."

Avory J. went so far as to remark at p. 349: "I quite recognize the force of Mr. Burrow's argument that, in adopting this construction, we are not giving full effect to considerations based on the mischief which is aimed at by this Act and particularly by s. 46 of it, because I do not doubt that a corporate body is capable of wilfully pretending to be qualified to act as a solicitor."

I repeat, however, that I am not persuaded that this judgment conflicts with the true purpose of the statute. As recited in the preamble to the Act which was first passed, the Legislature was seeking the better protection of the public with respect to

the erection of public and private buildings in the Province of Ontario and so long as the actual work is done by individuals who are members of the Association or under the supervision of members, it would seem to me that the object of the Act has been met.

In this regard reference may well be made to some of the text of the *Pharmaceutical Society* case. Lord Selborne made this observation at p. 868: "It is true that the Legislature has, in that case, required for the benefit of the public this safeguard, that there shall be an assistant duly qualified; but the Legislature shews that, having that case in view, it was not thought necessarily inconsistent with the object or the policy of the Act, that the principals or proprietors of the business, the persons deriving profit from it, to whom those actually selling the drugs would be responsible, might be unqualified persons, provided that there was in the business a duly qualified assistant. It by no means follows that all the drugs would necessarily be sold by that duly qualified assistant; or that he might not be, as in this case, under the general superintendence of a manager not himself duly qualified; all that is left open. It is, at least, not thought indispensable that the persons carrying on every such business should themselves, without exception, be duly qualified."

Lord Blackburn said at p. 872: "Then, my Lords, comes another objection. It is said, if you put that construction upon it you defeat the Act altogether. That I cannot agree to. I hold distinctly that there can be no sale, whether a corporation be the ultimate vendor or not, unless a 'person'—meaning a natural person—manages the sale, and that natural person if unqualified would, in my mind, clearly become liable to the penalty under the Act; and, although I am not so clear about this, I feel strongly inclined to think that if a corporation, or anybody else, caused an unqualified person to conduct sales, if it could be brought home to them and shewn that they did deliberately cause a person who was unqualified to conduct sales, they would be liable to the penalty under sect. 15, because *qui facit per alium facit per se*. I do not however say that as a certain thing, but I think it necessary to say that, because in the argument it was repeatedly assumed that if 'person' was here to be construed natural person,

a corporation was out of this Act altogether, which is not at all my *ratio decidendi*. I say that a corporation is entirely out of the clause which prohibits persons keeping an open shop, but I do not go farther than that and say anything more."

Even if I suspected that those responsible for the legislation had set out to extinguish the prerogative of bodies corporate to furnish architectural assistance, that suspicion would not allow me to ignore the apparent effect of the Act as it was drawn. Putting it another way, had it been their intention to subject companies to the penal clauses of the Act it would have been a simple thing to say so.

In this connection the words of Lord Watson at p. 874 of the report in the *Pharmaceutical Society* case are not without significance. He said: "It is not enough for me to speculate as to what was in the mind of the framer of this statute, whether he had forgotten the fact that there were corporations which either were dealing or might deal in poisonous drugs; or whether, having this in view, he framed this Act for the purpose of subjecting them to certain disabilities."

Mr. Fleming argued that the submissions put forward by his adversary were contrary to several decided cases. I do not think that they are.

The first case I should like to mention is *Re Skynner Lake Gold Mines Limited*, [1947] O.W.N. 945, [1948] 1 D.L.R. 540, a decision of the learned Chief Justice of Ontario. There it was made patent that the context of the Act and of the section being considered by the Chief Justice left open no rational possibility but that the word "person" in that section ought to include a body corporate.

The next case to which reference should be made is *Rex ex rel. Gardiner v. Dominion Construction Company Limited*, 53 B.C.R. 557, [1939] 1 W.W.R. 653, [1939] 2 D.L.R. 591, 72 C.C.C. 124. There the late Chief Justice of the Supreme Court of British Columbia decided that a corporation was liable to conviction for breach of somewhat similar provisions of the British Columbia Architects Act as he came to the conclusion that the full scope of the British Columbia Act required that the word "person" in the penal section should include "corporation", but

it is to be pointed out that the two Acts have one fundamental difference in that the British Columbia statute recognizes and makes provision for the activities of certain corporations. Accordingly, it is not difficult to see why the Chief Justice decided that if the Act gave certain privileges to companies it should be treated as imposing certain limitations upon those same companies. While the *Pharmaceutical Society* and *Law Society* cases were cited, they were apparently deemed inapplicable and I can only conclude that it was due to the dissimilarity between the two Acts respectively being considered. On the other hand, it is impossible to understand why the *Law Society* case does not govern me in view of the analogy of the provisions of the Ontario Architects Act to those of the English Solicitors Act.

The next case cited was *Rex v. The Ritholz Optical Co. Ltd.*, [1935] O.W.N. 69, [1935] 1 D.L.R. 681, 63 C.C.C. 212, but once again it is to be observed that The Optometry Act there being examined, 1931 (Ont.), c. 45, contained clauses which would permit corporations to function through qualified opticians and, that being so, the context of the Act would suggest that any companies which operated in that way would have to submit to the disciplinary provisions of the Act. In any event, the case does not stand for an express decision on the point which I have before me and it may be that it was not raised.

In *Doyle Clinic Limited v. Newton*, [1943] O.W.N. 411, His Honour Judge Gordon of Windsor decided that a limited company could not sue for medical services rendered by its employees. Here again the judgment turns upon the provisions of The Medical Act, R.S.O. 1937, c. 225, as to recovery of fees and does not really touch upon the problem contained in question 2 of the stated case here.

Counsel for the respondent supplied me with a certificate which would indicate that in 1944 a corporation known as W. A. Winger Limited was found guilty by a magistrate at Welland for that it unlawfully did, "not having been admitted and not having been enrolled and duly qualified to act as a solicitor, hold itself out or represent itself to be a solicitor . . . contrary to s. 6 of The Solicitors Act R.S.O. 1937, ch. 223 and amendments thereto". It would seem, therefore, that virtually the same question which came before the Divisional Court in England in the *Law Society* case was presented to the magistrate and that he differed from

the decision of that Court. For obvious reasons I prefer to follow the Divisional Court. In any event, I have no assurance that its judgment was even brought to the attention of the magistrate at Welland. If it had been the result would probably have been different.

By reason of the foregoing, therefore, I answer question 2 in the negative and order that the conviction be quashed.

In the light of the above, an answer to question 3 is perhaps unnecessary. However, I think I ought to say that it is my view that it would require an affirmative answer. A corporation can function or conduct its affairs only through its officers or servants or agents and any holding-out on its part would have to be through the activities of one or some of those persons.

In one sense success has been divided and for that and other reasons I am not making any order as to costs.

Appeal allowed.

Solicitors for the appellant: Bartlet, Braid, Richardes, Dickson & Jessup, Windsor.

Solicitors for the informant, respondent: Fleming, Smoke, Mulholland & Burgess, Toronto.

[SPENCE J.]

**St. Lawrence Rendering Company Ltd. v. The City of Cornwall.
The City of Cornwall v. St. Lawrence Rendering Company Ltd.**

Nuisances—Right to Sue—Public and Private Nuisance—Necessity for Showing Special Damage where Subject Sues to Restrain Public Nuisance—Impossibility of Class Action for Nuisance.

The Attorney-General is the only person entitled to sue to restrain a public nuisance, and there is no room for a class action based on nuisance. While a public nuisance may also be a private nuisance, if it differs in kind and not merely in degree, a subject who sues to restrain such a nuisance cannot succeed unless he establishes special damage resulting from it.

Parties—Adding Parties—Application at Trial to Add New Plaintiff by Counterclaim—Original Defendant without Status to Assert Counterclaim—The Judicature Act, R.S.O. 1950, c. 190, s. 15(h)—Rules 114, 134.

The Court will not, after the conclusion of a trial, having determined that the original defendant had no cause of action upon a counterclaim asserted by it, add a new plaintiff by counterclaim, who is not a defendant in the action, or to be added as a defendant, and whose presence is not necessary to enable the Court to dispose of all the issues raised by the original claim and counterclaim.

Public Utilities—Duties to Consumers—Discontinuance of Service—Permissible Grounds—Municipally-Owned Utility Supplying Consumers Outside Municipality—The Public Utilities Act, R.S.O. 1950, c. 320, ss. 11(1), 27(3), 55.

A public utility is bound at common law to treat all consumers alike, to charge one no more than others, and to supply the utility as a matter of law rather than of contract. It is not entitled to discontinue supply to a consumer upon any ground other than the consumer's failure to pay rates.

TWO ACTIONS, tried together.

21st to 26th May, 8th and 28th June 1951. The action was tried by SPENCE J. without a jury at Cornwall.

P. J. Bolsby, K.C., P. B. C. Pepper and H. A. V. Dancause, for the plaintiff company.

R. F. Wilson, K.C., and G. A. Stiles, for the defendant City.

24th August 1951. SPENCE J.:—These are two actions which were tried together at the city of Cornwall from the 21st to the 26th May 1951. In the first action, in which the writ of summons was issued on the 19th June 1950, the St. Lawrence Rendering Company Ltd. sued for an injunction restraining the Corporation of the City of Cornwall from discontinuing or in any way interfering with the flow or supply of water to the plaintiff's plant and, in the alternative, for a mandatory injunction compelling the City to continue to supply water, for an order quashing a resolution of the city council of the 17th

June 1950, which determined that the water supply should be discontinued, and for \$5,000 damages. The City of Cornwall filed a statement of defence to that action and a counterclaim and in the counterclaim alleged that the actions of the St. Lawrence Rendering Company Ltd. constituted a nuisance and claimed an injunction restraining the Company from so carrying on its operations as to commit a nuisance by the emission of obnoxious fumes, odours and gases, and also counterclaimed for damages in the sum of \$9,000. On the 20th November 1950 the municipal council of the Corporation of the City of Cornwall passed a similar resolution to discontinue the water, the said discontinuance to take place on the 20th May 1951, and on the 9th December 1950 the Corporation of the City of Cornwall issued a writ against the St. Lawrence Rendering Company Ltd. in which it claimed a declaration that the notice given on the 21st November 1950 was a valid notice. The St. Lawrence Rendering Company Ltd. counterclaimed in this second action for a declaration that the notice was illegal and a nullity and for an injunction restraining the Corporation of the City of Cornwall from acting or taking any proceedings under the said resolution. Upon the opening of the trial of the actions counsel for the St. Lawrence Rendering Company Ltd. moved to strike out the counterclaim filed by the corporation in the first action, that is, the counterclaim for an injunction, on the following grounds:

(1) that the plaintiff by counterclaim, the Corporation of the City of Cornwall, had no status to sue;

(2) that such plaintiff by counterclaim was attempting to allege and prove injuries to third parties;

(3) that the plaintiff by counterclaim was attempting to bring a class action for nuisance and that such an action was not maintainable.

When this motion was argued counsel for the Corporation of the City of Cornwall first objected that the matter was *res judicata* as an application had been made in Weekly Court which came before Mr. Justice King and which Mr. Justice King disposed of on the 6th September 1950. The notice of motion which instituted that application was for the following relief: "for an order to strike out that part of paragraph 6 of the Statement of Defence referred to in the original notice of motion

herein and all of the defendant's Counterclaim on the ground that the same are irrelevant and may tend to prejudice, embarrass or delay the fair trial of this action and that the said order of the Senior Master may be reversed or varied accordingly."

I have had the advantage of conferring with Mr. Justice King on the above application and I have perused both his notes of the argument and his endorsement of judgment on the notice of motion. That endorsement of judgment, in so far as it deals with the counterclaim, reads as follows: "Application of plaintiff to strike out defendant's counterclaim on ground that it discloses no cause of action or that defendant has no status to sue is dismissed for the reason, in part, that an order permitting the amendment of the counterclaim was made by the Senior Master on September 5, 1950, and otherwise I am of the opinion that I should not find at this stage that the defendant has no status. I am also of the opinion that the counterclaim before me in these proceedings indicates, rather vaguely it is true, a sufficient claim so that I should not strike it out under the circumstances, particularly where an order allowing the amendment has been taken out." I am therefore of the opinion that Mr. Justice King's order of the 6th September 1950 is one based on the well-recognized principle that a pleading should be stricken out as showing no cause of action only if it is clearly shown on the face of the pleading that no action is maintainable: *Electrical Development Company of Ontario v. Attorney-General for Ontario et al.*, [1919] A.C. 687, 47 D.L.R. 10; *Orpen v. Attorney-General for Ontario*, 56 O.L.R. 327 at 332-3, [1925] 2 D.L.R. 366, varied 56 O.L.R. 530, [1925] 3 D.L.R. 301; *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company*, [1892] 3 Ch. 374, and that I, therefore, am free to consider the application made by counsel on behalf of the St. Lawrence Rendering Company Ltd. without reference to the judgment of Mr. Justice King upon the aforesaid motion.

Counsel for the St. Lawrence Rendering Company Ltd. (hereinafter referred to as "the Company") argued that the nuisance complained of is a public nuisance and that therefore the nuisance may not be restrained at the suit of the municipality or even of a private individual, but rather only in proceedings initiated by the Attorney-General of the Province. A

“public nuisance” is defined in 24 Halsbury, 2nd ed. 1937, p. 24 at the foot, as follows:

“A public nuisance is one which inflicts damage, injury or inconvenience upon all the King’s subjects or upon all of a class who come within the sphere of its operation. It may, however, affect some to a greater extent than others.”

Counsel for the Corporation of the City of Cornwall (hereinafter called “the City”) alleged that the city in its counterclaim is setting up a public nuisance on behalf of all the citizens of the city and also a private nuisance alleging the damage it has suffered from the existence and continuance of the nuisance as an owner of the soil of public streets and of a certain park called King George V Park. The provisions of ss. 221-223 of The Criminal Code, R.S.C. 1927, c. 36, were referred to by counsel for the Company to show that the Dominion Parliament has recognized the principle that a public nuisance may be the subject of a prosecution.

There are, of course, many cases in which the Attorney-General has proceeded either to prosecute a public nuisance or to sue for an injunction to restrain the public nuisance both in England and in Canada and the proposition that the Attorney-General is a necessary party is repeated in many of these cases.

In *Wallasey Local Board v. Gracey* (1887), 36 Ch. D. 593, the action was taken in the first instance by the local board without the Attorney-General being a party to the action and Stirling J. at p. 597 cited this proposition and stayed the action until the Attorney-General joined, and then proceeded to grant the injunction. In *Tottenham Urban District Council v. Williamson & Sons, Limited*, [1896] 2 Q.B. 353, a strong Court approved *Wallasey Local Board v. Gracey*, and Kay L.J., at p. 354, said: “The ordinary law is, that when any one complains of a public nuisance he must obtain the fiat of the Attorney-General . . . unless he can shew . . . special damage to himself.”

In *Attorney-General v. Logan*, [1891] 2 Q.B. 100, the Attorney-General acted on the information of a local board to restrain the defendants from causing a public nuisance by emitting obnoxious smells and vapours. The cause of action therefore much resembled the counterclaim in the first action. The local board also joined as an individual plaintiff and alleged special damage in that the said obnoxious vapours caused injury

to trees and shrubs in the park which was the property to which the local board held title. The Court held that in so far as the public nuisance was concerned it might be restrained by the action of the Attorney-General and that so far as the private nuisance, that is the injury to the trees and shrubs in the park, was concerned, the local board could maintain an action for an injunction based on such special damage.

Halsbury, *loc. cit.*, at p. 55, cites various cases where the emission of noisome smells has been the subject of prosecution by the Attorney-General.

The proposition that a public nuisance is subject to restraint only at the suit of the Attorney-General has been repeated in Canadian cases: *Turtle v. City of Toronto* (1924), 56 O.L.R. 252; *O'Neil v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649, where Clute J., giving judgment in the Court of Appeal, said at p. 647: "The remedy is by indictment or an action at the suit of the Attorney-General. . . . A member of the public can only maintain an action . . . if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public", quoting from *Drake v. Sault Ste. Marie Pulp and Paper Company* (1898), 25 O.A.R. 251 at 269.

It would therefore appear that so far as the public nuisance is concerned the action is maintainable only at the suit of the Attorney-General and not at the suit of the municipality.

The municipality cannot succeed in its counterclaim by alleging a class action in that it acts on behalf of all the citizens of the municipality. Paragraph 13 of the City's counterclaim seems to set up that type of a class action in these words: "Inhabitants of the defendant are the owners and occupiers of lands in the said area of the City of Cornwall lying immediately to the east of the plaintiff's said lands and premises and such inhabitants of the defendant have suffered damage to the use and enjoyment of their premises by reason of the said fumes emitted by the plaintiff." A class action for nuisance is not maintainable: *Preston v. Hilton* (1920), 48 O.L.R. 172 at 179, 55 D.L.R. 647; *Turtle v. City of Toronto*, *supra*.

There remains to be considered the City's claim in so far as it is based upon the private nuisance. Such a claim is maintainable when the injury differs in nature and not merely in degree: *Turtle v. City of Toronto*, *supra*; *O'Neil v. Harper*, *supra*, and the same right of action may be asserted by a munic-

ipal corporation in reference to damage to its lands as may be asserted by a private citizen: *Attorney-General v. Logan, supra*. It is noteworthy, however, that in the latter case the local board alleged and proved that trees and shrubs in the public park were injured so that they withered and died as a result of obnoxious vapours. Here no such pleading is set up in the city's counterclaim and the only pleading of such damage to the city is contained in para. 12 of the counterclaim, which reads as follows:

"12. The defendant is the owner of streets, lanes and park lands in the area of the City of Cornwall lying immediately to the east of the plaintiff's said lands and premises which have been and are unusable and unenjoyable by reason of the said fumes emitted by the plaintiff."

Much evidence was given at the trial by citizens of Cornwall who had suffered discomfort, unpleasantness and, in some cases, even nausea when travelling on the public streets in the area or when attending either ball games or club meetings in the King George V Park. I take it, as proved by the City, that the title to the soil in both the public streets and the park is held by the City. I cannot, however, say that the City has proved any special damage in proving the discomfort of various citizens. It has simply proved with this evidence that possibly a public nuisance exists which could be restrained in the fashion I have outlined above. No special damage was alleged in the pleadings but some attempt was made at the trial to prove such damage. James Flaro, the foreman of the City's public works department in charge of construction of roadways, gave evidence that when laying a concrete roadway on Cumberland Street, immediately to the east of the Company's plant, in September 1950, he had had to move the crew engaged in the construction from the Seventh Street corner northerly to the Eighth Street corner on one day so that they could proceed with their work, the obnoxious odour being so overpowering that the crew could not continue to work at the Seventh Street corner. Flaro refused to say that the total time occupied in the work was any longer than if the obnoxious odour had not been present or that any additional cost had accrued to the City. Hyman Phillips, a realtor, was called by the City to give evidence. He stated that he was familiar with the problem caused by the obnoxious odours given off by the Company's plant but had had no personal experience; he

gave it as an opinion that if the odours were as bad as they were said to be, it would not add any value to any property in that section. "I would say it would hurt values." Cross-examined, Phillips stated that he had not sold any property in that section for three years, that is, for a considerably longer period than the Company's plant had been in operation. He had had a few listed. It was evident that upon this basis the City hoped to argue that the obnoxious odours lowered values and therefore eventually would lower assessment and, as a result, cause a decrease in the tax revenues. Such evidence falls far short of any such conclusion and no reliance can be placed upon it to prove such damage. Upon cross-examination by the Company's counsel the various witnesses produced to give evidence as to the effect of obnoxious odours both on the streets and in the park were unanimous in stating that communal activities continued in both places unabated. The ball leagues which function at King George V Park were most active throughout 1950 and to date in 1951. The associations which met in the club-house in that park were still meeting. The streets in the district were busy and crowded. Therefore if any diminution of usual communal activity can be held to be such damage to the City, no such diminution has been proved.

In the result, therefore, the City has failed to prove special damage and can maintain no action for an injunction based on such damage. Therefore the Corporation of the City of Cornwall, having proved no private nuisance and having no cause of action for public nuisance nor any right to bring a class action, fails upon its counterclaim.

After the completion of the evidence an adjournment was granted for the submission of argument by counsel. Such submission proceeded through the whole of the 8th June and then a further adjournment was granted until 22nd June. On that latter date counsel for the City moved for leave to add as a plaintiff by counterclaim, or to substitute in the place and stead of the City, the Attorney-General for Ontario. Counsel filed the consent of the Attorney-General which will be identified as ex. LL, and based such application on the provisions of Rule 134 and s. 15(h) of The Judicature Act, R.S.O. 1950, c. 190. Counsel for the Company, pointing out that the consent of the Attorney-General was the first document filed in the action

which exhibited such a style of cause, opposed the application, arguing that such an application could not be successful in law and even if it could have succeeded if made at an earlier stage it should not be granted when made for the first time after the completion of all the evidence. The position of counsel for the Company was that there was no need to add the Attorney-General to deal fully and effectually with the cause of action that the City had set up in its counterclaim and that there was no *bona fide* mistake in the commencement of proceedings by counterclaim in the name of the wrong person as plaintiff by counterclaim, or any doubt whether the action had been commenced in the name of the right person as plaintiff by counterclaim so that the City, as plaintiff by counterclaim, had not brought this application within the terms of Rule 134. Counsel for the Company as defendant by counterclaim further argued that neither Rule 134 nor any other Rule of Practice permitted the adding of a stranger to the action as a plaintiff by counterclaim and that by Rule 114 a defendant alone may counterclaim.

Firstly, as to *bona fide* mistake, the plaintiff and defendant by counterclaim moved early in the action to strike out the counterclaim and the defendant as plaintiff by counterclaim successfully opposed such application and had from that day to this the fullest notice of the plaintiff's contention that such counterclaim could not be maintained. Yet the defendant made no move to add the proper party, the Attorney-General, until after the trial and throughout the trial it has attempted to obtain judgment on the basis of a private nuisance and on the basis that the defendant City in counterclaiming is acting in some way as the agent for and representative of its citizens. Certainly on these facts I can find no *bona fide* mistake sufficient to justify the application of Rule 134.

The plaintiff alleges that the defendant, in paras. 12 and 13 of its counterclaim, has outlined the cause of action which it wished to advance in the said counterclaim, in para. 12 a private nuisance, in para. 13 a class action, and in the prayer for relief it asks an injunction and damages. There is no need to add the Attorney-General "in order to enable the Court effectually and completely to adjudicate upon the question involved in [that] action". I am of the opinion that I have completely adjudicated on such question by dismissing the counterclaim.

Therefore it would appear that the application to add the Attorney-General as a plaintiff by counterclaim must be considered on the basis that the original plaintiff by counterclaim, the City, had no cause of action, but it appears that someone else, i.e., the Attorney-General, might have had, and I must then determine whether the Attorney-General should be added to avoid multiplicity of actions.

The fact that the original plaintiff had no cause of action was regarded as irrelevant by the Court of Appeal in England in *Hughes v. The Pump House Hotel Company, Limited*, [1902] 2 K.B. 485, per Cozens-Hardy L.J. at p. 487, but in Ontario in *Colville v. Small* (1910), 22 O.L.R. 426, Riddell J., in giving one of the judgments in a Divisional Court, said at p. 429: "It is contended that the plaintiff should have leave to amend by adding his assignors, or substituting them, as plaintiffs. The Rules, however, never were intended to cover a case in which the actual plaintiff had no cause of action, but it is suggested some one else may have." The validity of this principle was acknowledged in *Mortimer v. Fesserton Timber Co. Limited* (1917), 40 O.L.R. 86, 39 D.L.R. 781, both by Hodgins J.A., giving the majority judgment of the Court, at p. 89, and by Ferguson J.A., dissenting, at p. 99.

The same principle has been adopted in other decisions in Courts in Ontario: *Winnett v. Heard*, 62 O.L.R. 61 at 65, [1928] 2 D.L.R. 594; *Fields v. Purser* (1928), 35 O.W.N. 205 at 206; *Croll v. Greenhow* (1930), 38 O.W.N. 101, affirmed 39 O.W.N. 105.

I have found no case in which the principle has been doubted, let alone refuted. Counsel for the City has cited *Ottawa Separate School Trustees v. Quebec Bank*; *The Same v. Bank of Ottawa*; *The Same v. Murphy* (1917), 39 O.L.R. 118, 35 D.L.R. 134, but that case deals with an application to add a party defendant and the principle announced by Riddell J. in *Colville v. Small*, *supra*, was not at issue. In *Bell v. Brill* (1931), 40 O.W.N. 374, Kelly J. dismissed an appeal from an order of the Master granting leave to add the United Silk Mills Limited as a party plaintiff. The judgment, however, was based on the consideration that it was doubtful whether Bell, as agent, had a right to sue in his own name and that therefore the power to add was contained expressly in Rule 134.

In the present case, I have, as I have said, already determined that the original plaintiff by counterclaim, *i.e.*, the City, had no cause of action and therefore there is, in my opinion, no doubt that would bring into play that provision in Rule 134.

Therefore, for these reasons, I have determined that I cannot grant the defendant's application to add the Attorney-General as party plaintiff by counterclaim.

Had I come to an opposite conclusion, considering the application simply as one to add a party plaintiff, I still would not have been able to consider an application to add the Attorney-General, not as plaintiff in the action but as a plaintiff by counterclaim, when the Attorney-General was not an original defendant. Rule 9 provides that a claim by His Majesty may be enforced by action by the Attorney-General. Section 1(a) of The Judicature Act defines "action" as "a civil proceeding commenced by writ or in such other manner as may be prescribed by the rules". Rule 114 provides: "A defendant may set up by way of counter-claim, any right or claim whether the same sounds in damages or not," and Rule 115 provides that: "A counter-claim shall be treated as an action, so as to enable the Court to pronounce a final judgment upon all matters *set up therein*." (The italics are mine.) But a counterclaim is not an "action": *Martin Transports Ltd. v. Moir*, [1936] O.R. 99, [1936] 2 D.L.R. 104, per Masten J.A. at p. 101. Counsel for the City was unable to cite any case where a person not a party defendant to the original action was added as a plaintiff by counterclaim. It has been held that the Court will refuse to add a person as a party defendant when the object of the application is merely to enable that person to counterclaim against the original plaintiff: *Norris et al. v. Beazley* (1877), 2 C.P.D. 80, and the cases in which the Court followed the course of adding a person as a party defendant to the original action and then permitting that added defendant to counterclaim against the original plaintiff are cases where the counterclaim was upon the same issue as the original claim and where the added defendant was a necessary and proper party to determine the original claim: *Fisher v. Fisher* (1920), 19 O.W.N. 227; *Spearman v. Renfrew Molybdenum Mines Limited* (1920), 17 O.W.N. 466. In the present case the Attorney-General was neither a necessary nor a proper party for the determination

of the issue in the action launched by the Company as plaintiff and the counterclaim did not involve the issue involved in the original action but an altogether different issue. Moreover, the consent of the Attorney-General is to be added as a plaintiff by counterclaim and the Attorney-General has given no consent to be added as a defendant. I am of the opinion that Rule 114 does not permit such a course, therefore on this ground also I would dismiss the application to add the Attorney-General as plaintiff by counterclaim.

It therefore becomes unnecessary for me to find as a fact whether or not a public nuisance existed. I had contemplated making such a finding in order to avoid further litigation should an appellate tribunal be of the opinion that my refusal to add the Attorney-General was in error. On further consideration I feel that such a finding might prove most embarrassing to any other Court trying an action brought by the Attorney-General, and of course the Attorney-General is not affected by this judgment in any right he may have to take proceedings as to an alleged public nuisance. Moreover, counsel for the Company alleges that he was prepared to meet at trial and did meet at trial only the cause of action alleged in the pleadings, and if the Attorney-General had appeared at the trial alleging a public nuisance then the Company would have submitted much evidence that was not required or relevant to the defence to the counterclaim as it was framed in the pleadings. That such an allegation might be of considerable merit is corroborated by the fact that the City adduced evidence from 32 witnesses largely to support its counterclaim while the Company, in defence to this counterclaim, called only six witnesses. It would therefore seem proper to refrain from making any finding of fact as to the existence of a public nuisance.

There remains to be considered the plaintiff's claim in the first action for an injunction to restrain the defendant from discontinuing water service or a mandatory injunction requiring the defendant to continue to supply water service and damages and the City's claim as plaintiff in the second action for a declaration that the notice of discontinuance served by the City on the 21st November 1950 was a lawful notice and that the City is under no obligation to supply water service to the defendant, *i.e.*, the plaintiff in the first action, the St. Lawrence Rendering Company Ltd.

A short summary of the history of the supply of water in the area would appear to be relevant. In 1886 the Town of Cornwall entered into an agreement with certain persons who were to incorporate a company to be called The Cornwall Water Works Company, granting these persons a 50-year franchise upon its streets, etc., requiring the construction of works of an extent outlined in the agreement and setting up a complete tariff of water rates which might be charged to consumers. In the agreement the Town reserved the right to purchase or appropriate the works within ten years. A copy of this agreement has been filed at the trial as ex. 1. In the same year the Township of Cornwall, by By-law 504 (ex. 2) permitted The Cornwall Water Works Company to lay down pipes, etc., in streets of the township. The by-law provided that the company was to furnish hydrants for fire protection and the water to consumers upon the same terms and conditions and at the same rates that the company furnished such hydrants and water in the town of Cornwall. The agreement was limited in effect to a period of ten years. The waterworks were established and the actual pump-house and main line of the waterworks were situate within the limits of the township of Cornwall, the line running across the southerly portion of the said township to the Town of Cornwall.

In 1896 the Town of Cornwall determined to acquire the waterworks system and enacted By-law 14 (ex. 7) declaring that "it is expedient in the interests of the Town of Cornwall to acquire the works and property of the Cornwall Water Works Company *both within and without* the Municipality of the Town of Cornwall". (The italics are my own.) The by-law continued to appoint an arbitrator and to authorize the clerk to notify the company that the Town intended "to acquire the Works and property of the Cornwall Water Works Company within and without the Municipality of the Town of Cornwall". By-law 21 (ex. 8) authorized the raising of money for the exact purpose. By-law 638 of the Township of Cornwall (ex. 9) enacted 1st June 1898 granted to the board of water commissioners of the Town of Cornwall the same rights and privileges as had, by By-law 504 (ex. 2) been granted to The Cornwall Water Works Company, stipulating: "Provided and this By-law is passed upon the express condition that the Corporation of the Township of

Cornwall shall have the privilege of renting hydrants at the rate of Fifty Dollars per annum per hydrant and that the said Board of Water Commissioners shall furnish if required hydrants for fire purposes and water to consumers or either upon the same terms and conditions and at the same rates that the Board of Water Commissioners furnish hydrants for fire purposes and water to consumers in the Town of Cornwall."

This by-law was limited in effect to ten years, but all witnesses agreed that from that day to the present the same procedure had been followed by the waterworks authorities with the inhabitants of the town of Cornwall, later the city of Cornwall, and the township of Cornwall, in exactly the same manner. Upon an application for water service being received, it was referred to the city engineer for report as to the cost of installation and then the applicant, or in some cases, if the extension was into a large, new sub-division in the township, the Township itself, was required to guarantee that the annual revenue would amount to at least one-tenth of the cost of installation; the installation was made; the city treasurer billed the consumer, whether he was an inhabitant of the city of Cornwall or of the township of Cornwall and deposited all rates in the waterworks account of the City.

It is unnecessary to go through each of the sixty documents filed as numbered exhibits and it is sufficient to say that dozens of them recite that the Town and later the City of Cornwall operated a waterworks system in the township of Cornwall. Some of these exhibits show that large grants were obtained from the Province of Ontario and the Dominion of Canada during the depression years for the extension of this system into areas both in the city and in the township.

When the plaintiff's predecessor in title applied for extension of water service to the plant in question, the City by By-law 147 for the year 1948 (ex. 48) authorized the extension and by By-law 190 for the year 1949 (ex. 49) authorized the issue of debentures to cover the cost. Both of the by-laws dealt with extensions some of which were within the city limits and some of which were outside the city limits and in the township of Cornwall. Both by-laws were perfectly usual corporate actions repeated innumerable times in reference to such extensions during the whole of the period from 1898 to the present time.

Until 1930 the fact that By-law 638 of the Township (ex-9) was limited in effect to ten years was forgotten, but in that year an agreement was drafted between the City and the Township to continue in effect the provisions of the said by-law. This agreement appears as ex. 23 and a photostat of the final page shows it to be so altered as to be illegible, to be executed by the then reeve of the Township but not the clerk, by the mayor and clerk of the City of Cornwall, but not to bear the seal of either municipality. Both the then reeve, Mr. W. A. Murray, and the mayor at the time and at the present time, Mr. Aaron Horovitz, gave evidence but could add little enlightenment as to the execution of this agreement and no by-law of either municipality could be produced authorizing the execution of the agreement.

From that day to the present, the City and the Township have entered into many almost annual agreements in reference to the supply of water for fire-protection purposes in the township, but never into another agreement for the supply of water to consumers in the township. Despite this informality, the City has continued to treat consumers in its own confines and within the township of Cornwall on exactly the same basis. The City, in fact, has enacted a series of by-laws regulating the operation of the water system, setting up rules, etc.

The by-law in effect during the years 1946 to 1950 would appear to be no. 67 for the year 1946 (ex. 46), which is entitled: "A By-law to Fix a Tariff for Water Rates in and around the City of Cornwall to be known as 'The Tariff of the Cornwall Water Works Department'." This by-law provides for the discontinuance of water to any consumer only upon the consumer's failure to pay the rates assessed, and it is significant that The Public Utilities Act, now R.S.O. 1950, c. 320, in s. 27(3) makes the same provision and such provision is the only one in the statute dealing with the discontinuance of water service.

In these circumstances the plaintiff submits that the then Town of Cornwall purchased or expropriated under an agreement in 1898 a public utility operated in the town of Cornwall and in the township of Cornwall and that the Town of Cornwall and later the City of Cornwall has continued to operate such public utility in the two areas to this day and that therefore at common law and by statutory enactment it is compelled to continue service to all consumers and may discontinue service only

for non-payment of rates. The plaintiff further submits that the resolutions of the municipal council of the defendant to discontinue the supply of water to the plaintiff, dated 17th June 1950 and 20th November 1950 (exhibits 53 and 58), were adopted without authority and were adopted in bad faith, being purported exercise of municipal powers for ulterior purposes. Counsel cites *Mayor, etc. of Westminster v. London and North Western Railway Company*, [1905] A.C. 426, per Lord Macnaghten at p. 432; *The Bell Telephone Company v. The Town of Owen Sound* (1904), 8 O.L.R. 74, per Meredith J. at p. 80; *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661, per Britton J. at p. 669. The various witnesses who were municipal officers or members of the municipal council of the defendant frankly admitted in evidence that they knew of no other cases where the water service had been discontinued to a consumer either in the city or in the township except for failure to pay water rates and quite frankly admitted that the purpose behind both resolutions was to drive the plaintiff company away from Cornwall and therefore to terminate the nuisance which they believed was caused by its operation.

That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear: *The Attorney-General of Canada v. The City of Toronto* (1893), 23 S.C.R. 514; *Scottish Ontario and Manitoba Land Co. v. City of Toronto* (1899), 26 O.A.R. 345; *The City of Hamilton v. The Hamilton Distillery Company; The Same v. The Hamilton Brewing Association* (1907), 38 S.C.R. 239; 51 Corpus Juris, para. 16.

Section 55 of The Public Utilities Act provides: "Where there is a sufficient supply of the public utility the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building." The City points to the words "within the municipality" and submits that this makes the section inapplicable to the present situation as the buildings of the plaintiff are within the township of Cornwall and not within the city of Cornwall although they are situate along the line of a supply-pipe installed for the purpose of supplying them.

"Municipality" is not defined in The Public Utilities Act. Section 11(1) of that statute provides: "A corporation may supply water to owners or occupants of land beyond the limits of the municipality", and counsel for the City submits a plausible argument that s. 55 compels supply within the borders and s. 11(1) permits supply to consumers beyond the borders if the requirements of The Municipal Act, to which I shall refer, are observed. The difficulty with that view, however, is that section 55, being in Part IV of the statute, applies by virtue of s. 49 to all municipal or other corporations owning or operating public utilities. One may imagine the case of the Brown Waterworks Company which supplies consumers in the municipality of Alpha Beta Omega. Surely then, the words "within the municipality" in s. 55, to have any meaning, must mean not the supplier of the utility but the area in which the utility is supplied. On the other hand, s. 11(1) of the statute may have a perfectly reasonable meaning and a perfectly proper application to the case of a municipal corporation operating a waterworks system solely within its own boundaries and then by agreement supplying certain consumers adjacent to but not within these boundaries.

I have been convinced from the evidence as to the original initiation of the waterworks system and all its subsequent history that what was established in 1886 by the private company, what was acquired in 1896 by the Town of Cornwall, what was operated from then on by the Town of Cornwall, and what is now operated by the City of Cornwall is a public utility system for the supplying of water to consumers on its line in both the present city of Cornwall and the township of Cornwall. That being so, its relationship with such consumers is not a matter of contract but of duty and the common law and also s. 55 of The Public Utilities Act compel it to continue to supply such consumers.

On this view, which is the one I adopt, the defendant's defence based on s. 259(1) of The Municipal Act, now R.S.O. 1950, c. 243, i.e., the necessity for the City acting by by-law, is untenable. However, even if such defence were available, the decisions in both England and Ontario have interpreted like sections regulating municipalities as not making unenforceable an executed contract where no by-law exists. *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, 48 D.L.R.

151, [1919] 3 W.W.R. 253, and *The City of Toronto v. Prince et al.*, [1934] S.C.R. 414, [1934] 3 D.L.R. 81, are both cases of the Courts holding that contracts were not executed. In *Macartney v. County of Haldimand* (1905), 10 O.L.R. 668, an executed contract was upheld notwithstanding the lack of a by-law.

In the present case the plaintiff's predecessors applied for water service (ex. 47). In the usual course the matter was referred to the city engineer for a report and he did report (ex. 46). A by-law to authorize the extension was enacted (ex. 48) and a by-law to authorize the necessary debenture issue was enacted (ex. 49). The water-main was connected and the water service was supplied. The treasurer of the defendant corporation billed the plaintiff and the bill was paid. I am of the opinion that the contract, if contract be necessary, was executed and the defendant cannot now say it is invalid. In my view, however, such consideration is secondary as the defendant was operating a public utility and once the line was extended along Seventh Street in the township of Cornwall, the defendant was under a duty, both at common law and by the aforesaid s. 55 of The Public Utilities Act, to supply the plaintiff, and any other person in the same position, with water service.

The plaintiff is therefore entitled to have the mandatory injunction it seeks and an order for such injunction will issue.

The second action, by which the City sought a declaration that its resolution of November 1950 to discontinue the supply of water was a valid exercise of its powers, must be dismissed for the reasons which already have been outlined.

The plaintiff St. Lawrence Rendering Company Ltd. is entitled to the costs of its action and of its defence to the City's counterclaim, which must be dismissed with costs. The second action, in which the City was plaintiff, will also be dismissed with costs up to but not including any costs of trial.

Judgment accordingly.

Solicitors for the Company: Bolsby & Pepper, Toronto.

Solicitor for the City: George A. Stiles, Cornwall.

[COURT OF APPEAL.]

Manchester et al. v. Dixie Cup Company (Canada) Limited.*Landlord and Tenant—Obligations of Lessee—Covenant to Repair—Premises Not in Good Repair at Beginning of Term—Construction of Covenant.*

A covenant by a lessee that he will "well and sufficiently repair, maintain and keep the said demised premises and every portion thereof . . . in good and substantial repair . . . [and] will leave the premises in good repair" does not require the lessee to *put* the premises in good and substantial repair if they are not in that condition at the beginning of the tenancy, but requires only that he shall *keep* them in as good condition as that in which he takes them. *Proudfoot v. Hart* (1890), 25 Q.B.D. 42, and other authorities, distinguished.

Landlord and Tenant—Lease—Term Less than Three Years—Subsequent Oral Agreement Varying Terms of Original Written Lease—Validity—The Statute of Frauds, R.S.O. 1950, c. 371, ss. 1-4.

Since a lease for a term of less than three years is not required to be in writing (*Re Linzon and Wolfish* (1921), 20 O.W.N. 416; *Pain v. Dixon* (1922), 52 O.L.R. 347 at 349, applied), it follows that even if the parties have embodied the lease in a written document they may, by a new contract not in writing, add to, subtract from, vary or qualify its terms and thus make a new contract which can be proved partly by the written instrument and partly by the subsequent oral terms engrafted upon it. Phipson on Evidence, 8th ed. 1942, p. 576, approved.

AN APPEAL by the plaintiffs from a judgment of Wilson J., giving judgment for the plaintiffs for only part of their claim.

21st and 22nd March and 28th May 1951. The appeal was heard by ROACH, AYLESWORTH and GIBSON JJ.A.

Gordon N. Shaver, K.C., for the plaintiffs, appellants: The original lease, for five years, was in writing and under seal, as required, and its character was not changed by the subsequent agreement in writing, also under seal, that shortened the term to two years and nine months. The alleged oral agreement of May 1949 was not properly proved, and in any event the written lease could not be varied by a parol agreement: The Statute of Frauds, R.S.O. 1950, c. 371, ss. 1, 2 and 3. A mere oral agreement in such circumstances would be unenforceable, because there was no part performance. [ROACH J.A.: Surely there is part performance where the landlord moves in and occupies part of the premises.] I submit not. [AYLESWORTH J.A.: If the agreement, as orally varied, is partly performed, is it taken out of the statute?] If there were part performance of a wholly new arrangement it might have that effect, but the part performance must be clear and unequivocally related to the arrangement, and must be proved to the Court's satisfaction. There are here

no acts of part performance that are unequivocally referable to the alleged oral agreement: 20 Halsbury, 2nd ed. 1936, p. 47; *Cooth v. Jackson* (1801), 6 Ves. 11, 31 E.R. 913; *Frame v. Dawson* (1807), 14 Ves. 386, 33 E.R. 569; *Leduc and Co. v. Ward et al.* (1888), 4 T.L.R. 313; *Re Rabinovitch and Booth* (1914), 31 O.L.R. 88, 19 D.L.R. 296. "Giving up possession" means giving up possession of the premises as a whole, and possession of the whole was not given until 30th July, so that plaintiffs are entitled to July rent in full. [AYLESWORTH J.A.: Have you any authority for the submission that the written amending agreement has not the effect of taking the lease, as amended, out of the statute, and bringing it within the exception?] No. [AYLESWORTH J.A.: So everything you have said so far is predicated on the assumption that the original lease, as varied in writing, was required to be in writing?] Yes.

The meaning of the word "repair" in covenants such as the one in this case is discussed in *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905. The construction is the same whether the covenant specifies "tenantable repair", "habitable repair" or "good repair": *Proudfoot v. Hart* (1890), 25 Q.B.D. 42; *Harris v. Jones* (1832), 1 Mood. & R. 173, 174 E.R. 59; Hill and Redman's Law of Landlord and Tenant, 10th ed. 1946, p. 183. "Keep in repair" is equivalent to "put in repair": *Payne v. Haine* (1847), 16 M. & W. 541, 153 E.R. 1304; *Woolcock v. Dew* (1858), 1 F. & F. 337, 175 E.R. 753; *Lurcott v. Wakely & Wheeler*, *supra*. The condition of the premises at the commencement of the term is immaterial, since the lessee was required to "keep" or "put" them in repair. *Proudfoot v. Hart*, *supra*, is authority for the proposition that the premises must be put in such a condition that they are fit for occupation by the kind of tenant who would be likely to want such premises, taking into consideration the nature of their use, the character of the neighbourhood, etc. I refer also to *Calthorpe v. McOscar et al.*, [1923] 2 K.B. 573, and on appeal *sub nom. Anstruther-Gough-Calthorpe v. McOscar et al.*, [1924] 1 K.B. 716.

As to the exception for "reasonable wear and tear" I refer to *Terrell v. Murray* (1901), 17 T.L.R. 570; *The Manchester Bonded Warehouse Company, Limited v. Carr* (1880), 5 C.P.D. 507; *Scales v. Lawrence* (1860), 2 F. & F. 289, 175 E.R. 1065; *Taylor v. Webb*, [1937] 2 K.B. 283, [1937] 1 All E.R. 590. The effect of

this exception is that the tenant is not bound to make good dilapidations caused by the friction of air, or by exposure, or by ordinary use. The exception must be strictly construed, and as to ordinary user, *Taylor v. Webb, supra*, seems to establish that in this connection the word "reasonable" has the same meaning as "fair", and that both are synonymous with "normal", which means what the parties would reasonably anticipate in the circumstances surrounding the particular demise: see also *McCuaig v. Lalonde* (1911), 23 O.L.R. 312. The onus is on the lessee to bring himself within the exception: *Taylor v. Webb, supra*.

The plaintiffs did not contemplate that the wax would penetrate the brick and concrete. This impregnation constituted more than reasonable wear and tear. [ROACH J.A.: If the tenant used modern equipment, and notwithstanding that there was a tendency for wax fumes to escape and coat the walls, was that not reasonable wear and tear?] The test is not what was done but what was the result. [ROACH J.A.: If it is incidental to the manufacture of paper cups, modern equipment being used, that wax is bound to escape and coat the walls, does that not constitute reasonable wear and tear?] To say that disregards the doctrine of waste. The wax has damaged the reversion, and the lessee is liable: The Conveyancing and Law of Property Act, R.S.O. 1950, c. 68, s. 32.

As to the floors, if a floor becomes rotten a tenant who has covenanted to repair is bound to put down a new floor: *Proudfoot v. Hart, supra*. The rotting of the flooring and sub-flooring, and in some cases of the concrete, by oil was caused by defective drip-pans under the machines, and was not ordinary wear and tear.

This case depends upon the construction of written instruments rather than upon the credibility of witnesses, and this Court is consequently in as good a position as the trial judge to decide the issues. The trial judge overlooked many important matters, such as the injury to the reversion and the question of onus: *Re Beardmore*, [1935] O.R. 526, [1935] 4 D.L.R. 562; *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243.

J. F. Boland, K.C., for the plaintiffs, appellants, after dealing with the evidence as to the condition of the floors, referred to *Proudfoot v. Hart, supra*; *A. & J. Inglis v. John Buttery & Co.*

(1878), 3 App. Cas. 552; and *Lurcott v. Wakely & Wheeler*, *supra*, as to the general law of landlord and tenant, and, on the question of damages, to *Joyner v. Weeks*, [1891] 2 Q.B. 31.

J. J. Robinette, K.C. (*J. D. Reilly*, with him), for the defendant, respondent: The evidence overwhelmingly supports the trial judge's finding of fact that there was an oral agreement between the parties that there should be a gradual vacating of the premises and a proportionate reduction of rent. Apart from The Statute of Frauds, R.S.O. 1950, c. 371, there is no rule of law that prevents parties from orally modifying a written agreement. The parol evidence rule does not prevent the admission of oral evidence to show that a written agreement has been modified or terminated by the parties after its execution. Even an agreement under seal may be modified or terminated by a subsequent oral agreement: 7 Halsbury, 2nd ed. 1932, p. 179; *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, 110 E.R. 713; *Berry v. Berry*, [1929] 2 K.B. 316.

In this case the two documents must be read together, and the result is that the lease is for two years and nine months only, and it is therefore not required to be in writing: The Statute of Frauds, ss. 1, 2 and 3. It has been held in Ontario, contrary to the interpretation given to the statute in England, that s. 4 of the statute is also inapplicable either to a lease or to an agreement for a lease: *Re Linzon and Wolfish* (1921), 20 O.W.N. 416; *Pain v. Dixon*, 52 O.L.R. 347, [1923] 3 D.L.R. 1167. [AYLESWORTH J.A.: You are saying that although s. 3 in terms excludes the application only of ss. 1 and 2, the effect of the cases is also to exclude the operation of s. 4?] Yes. Decisions of long standing on questions of property law, on which people have relied, should not be overruled.

In any event there were acts of part performance reasonably referable to the new agreement, which would take the case out of the statute: *Maddison v. Alderson* (1883), 8 App. Cas. 467; *McLean v. Little*, [1943] O.R. 202, [1943] 2 D.L.R. 140.

As to the coating of wax, our user of the premises was fair and reasonable, having regard to the nature of the building and the purpose for which it was let. All the cases referred to on behalf of the appellant in this connection were decided upon absolute covenants to repair, with no exception for reasonable wear and tear. In long-term leases with absolute covenants to

repair it is reasonable that "keep in repair" should be construed as "put and keep in repair", but that interpretation cannot apply where there is an exception for reasonable wear and tear: *Taylor v. Webb*, [1937] 2 K.B. 283, [1937] 1 All E.R. 590. There was no substantial difference in the condition of these premises at the beginning and at the end of the term. The plaintiffs demand absolute perfection, not reasonable repair. Under a covenant worded as this one is, the tenant is bound only to keep the premises in as good a state of repair as existed at the commencement of the term. [ROACH J.A.: You say that the tenant's obligation is only that he must leave the premises in substantially the same condition as when he entered, less reasonable wear and tear?] Yes. I refer also to *Perry et ux. v. The Bank of Upper Canada* (1866), 16 U.C.C.P. 404.

As to the flooring, if portions were defective their condition was not due to any conduct on our part beyond reasonable wear and tear: *Taylor v. Webb*, *supra*. At the commencement of this lease the floors were at least 20 years old, and the lease by its very terms contemplated that the building would be used for manufacturing. Our user was fair and reasonable.

Gordon N. Shaver, K.C., in reply: The lease was originally for five years and therefore not within the exception of s. 3 of The Statute of Frauds. As to the alleged acts of part performance, they were indefinite and equivocal; to take the case out of the statute they must be referable only to the alleged oral agreement: *Chaproniere v. Lambert*, [1917] 2 Ch. 356. I refer also to *Cutts v. Taltal Railway Co. (Lim.)* (1918), 62 Sol. Jo. 423; *Besseler Waechter Glover and Company v. South Derwent Coal Company, Limited* [1938] 1 K.B. 408, [1937] 4 All E.R. 552; *Ramsden v. Nunziato*, [1951] O.R. 346, [1951] 2 D.L.R. 806.

As to the wax, it cannot be reasonable user if the condition of the premises at the end of the term is not such as could reasonably have been anticipated: *McCuaig v. Lalonde*, *supra*.

Cur. adv. vult.

4th September 1951. The judgment of the Court was delivered by

ROACH J.A.:—The plaintiffs, Alan Manchester and A. Donald Manchester, as lessors entered into a written lease with the defendant as lessee of manufacturing premises in the city of

Toronto, consisting of the ground floor, including annex, and part of the basement of no. 100 Sterling Road. The written lease consists of two documents; first, a lease dated 30th September 1946, which was expressed to be for a term of 5 years, to be computed from 1st January 1947 and to be fully complete and ended on 31st December 1952; by it the rent was fixed at \$13,383.50 yearly, payable \$1,115.29 monthly in advance, on the first day of each month commencing on 1st January 1947; second, an agreement in writing dated 31st December 1946, which date, it is to be noted, was prior to the commencement of the term of the lease, by which the parties agreed with one another as follows:

1. The term of the lease was shortened and was to end on 30th September 1949.

2. The defendant was to endeavour to secure satisfactory space for its requirements elsewhere and in the event of its finding such space prior to 30th September 1949 it was to vacate and deliver up possession of the demised premises as soon as it was able to vacate them.

3. The rent of the demised premises was to cease when the defendant gave up possession of the same.

4. In every other respect the lease dated 30th September was ratified and confirmed.

According to the evidence, the lease and the agreement were executed at the same time, namely, "around the end of the year".

The defendant had been a tenant in possession of the demised premises under a lease from the former owner for a term which was due to expire on 31st December 1946, and it continued in possession under the terms of the new lease as amended by the agreement.

The defendant vacated the basement by 31st May 1949. It removed most of its machinery from the ground floor and annex by 30th June 1949, and all of it was removed therefrom by 29th July 1949. The defendant paid the rent for the whole premises up to 30th June 1949.

In this action the plaintiffs pleaded: (1) that the defendant vacated the demised premises on or about 27th July 1949, but did not surrender the key; (2) breach by the defendant of its covenant to keep the demised premises in substantial repair;

that as a result of such breach the plaintiffs expended the sum of \$6,729.98 in repairing the same, and the premises were not fit for occupation by another tenant until those repairs were made, *viz.*, until September 1949.

On that pleading the plaintiffs claimed: (a) \$2,230.58, being rent for the months of July and August; (b) \$6,729.98, being the amount expended by them for repairs; (c) their costs of the action.

In its statement of defence the defendant pleaded:

1. That about the end of May 1949, when the cheque for the June rent had been made out but not yet delivered to the plaintiffs, the plaintiffs, being anxious to obtain possession of the demised premises prior to the termination of the lease and to renovate and decorate the same for a new tenant, Manchester Paper Boxes Limited, entered into an oral agreement with the defendant as follows, *viz.*, that the defendant would surrender portions of the demised premises as quickly as it could remove its equipment to a new building which it had under construction and which was nearing completion, and that the plaintiffs would allow it a reduction in the rent proportionate to the floor space from time to time vacated; that pursuant to that agreement it surrendered possession of the basement to the plaintiffs by 31st May but nevertheless delivered the cheque which had been made out for the June rent on the understanding with the plaintiffs that in paying such rent as it might owe for the month of July it would be entitled to a credit of \$180, being the amount by which the June rent should be abated due to the defendant having surrendered possession of the basement.

2. That by way of rent it was indebted to the plaintiffs in the sum of \$287.65 only, which amount it paid into court, made up as follows:

Monthly rent as per lease	\$1,115.29
Less rent of basement for July (area of basement 5,400 square feet at 40 cents per square foot per year)	\$180.00
Less rent for one-half of ground floor and annex surrendered to plaintiffs by June 30th	467.64

Rent to which plaintiffs entitled for		
July	467.65	467.65
Credit defendant for over-payment in June		180.00
		<hr/>
Balance		\$287.65

3. That it had vacated the whole of the demised premises by 31st July 1949, and was not liable for any rental for any period thereafter.

4. That it had kept the premises in good repair, reasonable wear and tear only excepted.

The learned trial judge held that there was an agreement for an abatement of the rent as pleaded by the defendant, and that on that basis the amount paid into court completely satisfied any claim for rent. He therefore gave judgment to the plaintiffs for that amount. He dismissed the plaintiffs' claim based on an alleged breach of the covenant with respect to repair, holding that the condition of which the plaintiffs complained amounted to no more than ordinary wear and tear, having regard to the nature of the manufacturing business which the defendant operated and of which not only the plaintiffs had notice but which also the lease permitted the defendant to operate in the demised premises.

From that judgment the plaintiffs now appeal.

On behalf of the appellants it was argued, with respect to the claim for rent, first, that the written lease could not be varied by any subsequent oral agreement; second, that in any event there was no subsequent oral agreement made between the parties.

If the lease was one not required by law to be in writing, it was competent to the parties by a new contract not in writing to add to, subtract from, vary or qualify the terms of it and thus make a new contract which could be proved partly by the written contract and partly by the subsequent oral terms engrafted upon what was left of the written contract: Phipson on Evidence, 8th ed., 1942, p. 576.

The original lease and the amending written agreement should be read together. Together they form a contract of letting for a term commencing on 1st January 1947 and ending not later than 30th September 1949—a total period of two years and nine months. Because it was for a term less than three

years it was not required by law to be in writing: *Re Linzon and Wolfish* (1921), 20 O.W.N. 416; *Pain v. Dixon*, 52 O.L.R. 347 at 349, [1923] 3 D.L.R. 1167.

Then was there an oral agreement which varied the written contract?

One Thomas D. Currie was the general manager and a director of the defendant. He gave evidence, and from his evidence I extract the following:

“Q. Now, can you recall any particular conversation with Mr. Alan Manchester?

“HIS LORDSHIP: About what?

“MR REILLY: Q. About securing possession before the end of September? A. Well, I mentioned that he had spoken to us and asked us if we were doing something about it and we told him we were. I don't think, outside of casual remarks, that I had any further conversation with him until near the end of May in 1949 . . .

“Q. Now, what is your recollection of the statement made to you by Mr. Alan Manchester in this conversation? A. His statement to me was, when I pressed him to see if we could set some figure or some arrangement and I suggested that I thought that a proper arrangement would be that if we paid rent for the space that we occupied for the time we occupied it, Mr. Manchester made the statement that—Well, he certainly wouldn't be too tough with us. He said something else.

“Q. But he said there was no agreement, do you agree with that? A. Well, I took that he agreed with me. That was my understanding.

“Q. You agree with his statement, as you have given it now in evidence, that he said he would not be too tough on you? A. Yes. . . .

“Q. All I want, Mr. Currie, if you will please just give me what the arrangement was which you say was made in that conversation with Alan Manchester? A. The arrangement I made with Alan Manchester was that we would move out of the basement right away so that he could get started to paint it. We did that and they started painting. Then, I said that I felt that we could get out of the rest of the floor by the end of June but if we had run into unforeseen difficulties I might want to keep some of the machines on the main floor into July. Then,

I asked what arrangement, Mr. Manchester suggested that would be all right. He had no objection to that and I asked what would be the arrangement about rent and I think that is when he said, 'Well, we are decent people and we can get along', and a few things like that; and I said 'In my opinion a fair way to do it would be that we would pay you for the space we occupied for the time that we occupied it', and my understanding was that that was accepted by Mr. Manchester.

"Q. Did not Mr. Alan Manchester say to you, 'We will not be too tough', but there was no agreement at all? A. Now, he used the words 'too tough', but he didn't use the words, 'There is no agreement at all.' "

The plaintiff Alan Manchester in his evidence stated as follows:

"Q. What was the discussion between you and Mr. Currie? A. Mr. Currie mentioned he would get out as soon as he could. My words to Mr. Currie: 'We are decent people doing business in the city of Toronto, we don't split hairs.' When it came to the question of a settlement we would be decent, we only know how to be decent.

"Q. How did those words arise? A. More or less because he talked about rentals.

"Q. What did he talk about rentals? A. About the discount on the rent. I said, 'When you get out, if there is any adjustment, we will be decent about it' and, 'We don't split hairs'; and if Mr. Currie can remember as long as I can he would remember just those words.

"Q. What did Mr. Currie say to you on these occasions? A. I don't recall, but those were my words to Mr. Currie.

"Q. Why would you reply 'We don't split hairs, we will be reasonable about any settlement'? A. Mr. Reilly, I am not going to remember something that I can't remember; I will not lie.

"Q. You are on oath and I do not anticipate you will. A. I do not intend to.

"Q. All I want to know is why you would say, 'We don't split hairs, we will be reasonable on the settlement'? A. I thought we were doing business with decent people, too.

"HIS LORDSHIP: Q. Was this the situation: you wanted to get this space and for them to get out as soon as they could,

notwithstanding the fact the defendant had agreed to give up possession by the end of September? A. Correct, my Lord.

“Q. And Mr. Currie said to you, ‘What about the rent?’ and you said you would adjust it? A. Something along those lines.

“Q. That was the trend of the negotiations? A. Yes, your Lordship.”

The learned trial judge in his reasons stated that he accepted the evidence of Currie where it was in conflict with that of the plaintiffs.

Mr. Harry H. Williams was the office manager of the defendant. He gave evidence and, referring to the cheque for the June rent, he said that the cheque had been made out and sent to the office of the parent company in the United States for signature. As a result of subsequent discussions with Currie he telephoned the plaintiff Donald Manchester, and his evidence of that telephone conversation is as follows:

“Q. As a result of instructions, what, if anything, did you do? A. Well, I called Mr. Donald Manchester and advised him that we had included in the rent cheque for June the amount of money to cover the basement rent and that, unfortunately, we had given up the possession of the basement, we would deduct from our next cheque, and that was agreed upon.

“Q. Did Mr. Donald Manchester agree to that? A. Yes, sir.

“Q. Was there any quibbling? A. No, there was no argument at all.”

Under date 15th July 1949 the plaintiffs wrote to Currie saying in part as follows:

“This is to serve notice on you as the Official Agent of the Dixie Cup (Canada) Limited, that we must definitely have the full occupancy of the area you now occupy in our building on Midnight, July 31, 1949.”

It was argued on behalf of the appellants that the evidence did not indicate any concluded agreement for an abatement of rent for the portions of the demised premises which the respondent might thereafter from time to time surrender to the appellants. The appellants cannot escape from this conclusion, *viz.*, that they induced the respondent to surrender possession of portions of the demised premises on the representation that if it did so they, the appellants, would be “decent” about it. By “decency” the appellant Alan Manchester meant that in return

for so doing the respondent would be given what he called a “discount on the rent”. The plaintiff Donald Manchester in his telephone conversation acquiesced in the suggestion made to him by Currie. The appellants knew that the respondent, at considerable inconvenience to itself, was vacating portions of the premises on the understanding that it would be allowed an abatement, and it is now too late for them to deny that right to it. They are estopped by their conduct from so doing.

There is no difficulty in ascertaining the rental rate of portions of the premises. At the trial a letter from the defendant’s solicitors to the plaintiffs’ solicitor, dated 31st December 1946, was filed as an exhibit, showing the manner in which the monthly rental was computed, *viz.*, as follows:

“Annual rent for ground floor—	
22,447 square feet at .50 per sq. ft.	\$11,223.50
“Annual rent for basement—	
5,400 square feet at .40 per sq. ft.	2,160.00
“Total Annual rent	\$13,383.50
“Monthly rent	\$1,115.29”

On the basis of the rate per square foot therein set out, the amount paid into court by the defendant satisfied all rent owing by the defendant under the terms of the lease, as varied by the oral agreement, for the portions of the demised premises not surrendered to the plaintiffs prior to 31st July. If the plaintiffs have any further claim against the defendant it cannot be in respect of rent but only by way of damages for breach of the covenant to repair.

On that branch of the plaintiff’s claim, the following covenants and agreements in the lease are relevant:

“AND the said Lessee COVENANTS with the said Lessors that it will, during the said term hereby granted, well and sufficiently repair, maintain and keep the said demised premises and every portion thereof with the appurtenances in good and substantial repair . . . when and where and so often as need shall be, reasonable wear and tear and damage by fire, lightning and tempest only excepted. . . .

“AND the Lessee further agrees to use the said premises only for the usual and ordinary business of the manufacture and distribution of sanitary drinking cups, paper containers and recep-

tacles and other similar articles, or for such other purposes as shall not involve a greater fire hazard or be more injurious to the building or more offensive than such business, and for no other purposes, without the written consent of the Lessors first obtained.

“AND that it will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.”

The plaintiffs claimed a breach of the covenants respecting repair in two particulars: first, by negligently allowing hot wax to escape during the defendant's manufacturing processes and cover the walls, floor, ceiling, pillars, pipes and fixtures and to penetrate into the inside brick; second, by damaging the floors.

Before dealing with either of those claims it is desirable that something should be said with respect to the nature of the manufacturing business conducted by the respondent in those premises, during its whole occupancy thereof.

The respondent had accupied these premises since some time in the year 1937. The appellants became owners of the building in September 1946. As earlier stated, the respondent's lease with the former owner was not due to expire until 31st December 1946, so for the balance of the term of that earlier lease the respondent paid the rent as it became due to the appellants.

During the whole of the occupancy of the premises by the respondent there was no change in the type of business which it carried on therein, nor, subject to some deviation to which I shall later refer, was there any change in the manner in which it conducted that type of manufacturing business.

The business of the respondent is the manufacturing and sale of paper drinking-cups and other paper containers. Those products are cut and shaped and then sprayed with hot wax. The actual spraying was done by machines which were described as “treaters”. The cups, or other containers, were carried into an enclosed chamber of the treater on a belt conveyer and as they passed through that chamber the hot wax was sprayed on them. As they were being carried along after emerging from the treater wax-laden vapour arose from them. Electric fans and openings had been installed at appropriate places, designed to carry the wax-laden vapour out of the building, but notwithstanding these devices some of that vapour adhered to

the walls and other surfaces and in due course there was a volume of wax deposit on those surfaces, and some of it penetrated into the pores of the brick walls. The heaviest concentration of wax on the surfaces and the penetration were in the areas closest to the treaters.

The respondent at all times knew that wax was being deposited on the walls, ceilings and other surfaces which were in reasonably close proximity to the treaters, and from time to time it took steps to remove those deposits. Weekly, in the room where the treaters were installed, the walls and ceiling were scraped with scrapers such as are used for scraping ice from sidewalks, and they were brushed with wire brushes and brooms. These methods sufficed to remove that part of the wax deposits which appeared as fluff on the walls and other surfaces, but there is no doubt, on the evidence, that they did not suffice to remove all the wax that was thus deposited, and the residue which was left consisted of a film of wax on the surfaces, of various thicknesses, and, of course, included in what was left was that part of the deposit which had penetrated into the pores of the brick.

Apart from the machines known as treaters, there were other pieces of machinery installed in other places throughout the plant, those other machines each performing various functions in connection with the respondent's business. To a very large extent the plaintiffs' claim with respect to floors has to do with the condition of the floors under or near to those machines, the plaintiffs' claim with respect thereto being that the floors in those areas have rotted because of the failure of the respondent to provide adequate facilities for protecting them against oil and/or grease escaping from the machines. The balance of the plaintiffs' claim with respect to the floors consists of allegations that they have been damaged, (a) by the iron wheels of carts which were pushed around the plant, and (b) by water which overflowed in the area of a drinking fountain.

The question of law arises as to the extent of the respondent's obligation to repair under the relevant covenants which I earlier quoted. In considering that obligation it becomes necessary, so far as the coating or impregnation of wax is concerned, to divide the premises into three areas—first, the annex; second, the

treater-room; third, the area outside the treater-room. I divide the premises into those areas for factual reasons.

At one time the treating-machines were installed and operated in the annex, but they had been removed from the annex long before the appellants purchased the building. Unquestionably, during the time the treaters were in operation in the annex wax had escaped and been deposited on the ceiling and walls of that area. The appellants complain of that condition, but it is clear that that condition existed in that area at the time the appellants became the owners of the premises. That condition became neither better nor worse in the meantime.

The condition in the treater-room, on evidence which the trial judge accepted, was the same when the respondent vacated as at the commencement of the lease. Unquestionably, during the term of the lease wax was being deposited on the walls and ceiling of the treater-room, and weekly the methods I have earlier described for removing the same were adopted by the respondent, but any increase in the residue of wax which was deposited during the term did not make the condition of those surfaces in the treater-room appreciably worse than it was at the beginning of the lease.

In December 1948 an additional treating-machine was installed just outside the door leading into the treater-room, and it continued in operation until April 1949. There is some evidence on behalf of the respondent that the condition with respect to wax on the walls, ceiling and other surfaces in that area was no different at the end of the term than it was at its beginning. On the other hand, there is other evidence on behalf of the appellants that the deposits in that area were greater at the end of the lease than they were at the beginning. To my mind it would be unreasonable to conclude that there had been no difference caused in the condition of the walls, ceiling and other surfaces in that area by the installation of the additional treating-machine at that particular place. Wax was bound to escape in that area after the machine was installed and in operation, when formerly none escaped into that area except perhaps an inappreciable amount which might come out of the treater-room. The condition in that area, therefore, was worse at the end of the term than it was at the beginning.

If the respondent, by virtue of the covenants, was obliged to remove the wax from the walls and other surfaces in the annex, then, the respondent having failed to do so, the appellants were entitled to have it removed and to recover the cost thereof from the respondent.

So far as the condition of the treater-room is concerned different considerations apply. Because there was already a coating and impregnation of wax on and in the surfaces of that room at the beginning of the term, was the defendant obligated under its covenant, (a) to remove it, and (b) to keep it removed?

So far as the condition in the area immediately outside the door leading into the treater-room was concerned, was the respondent obligated under its covenant to keep the walls and ceiling in that area free from wax?

At least some of the questions I have posed are embodied in this more general question, namely, was the respondent, under its covenant, required to do more than maintain the premises in their condition as of the commencement of the term of the lease, subject only to reasonable wear and tear thereafter?

The covenant which I have first quoted raises a difficult question of construction. It requires that the respondent shall "well and sufficiently repair, maintain and keep the said demised premises . . . in good and substantial repair . . . reasonable wear and tear and damage by fire, lightning and tempest only excepted".

I should state at once that, in my opinion, a building of the type here in question is not in a state of good and substantial repair if its walls and ceiling are so incrustated with wax that those surfaces cannot be painted. There was evidence that at least in those sections where incrustation of wax was the thickest efforts were made by the appellants to paint those surfaces, but the paint would not adhere to the surface and would not dry. In my opinion, therefore, the annex, the treater-room and, to a lesser extent, the area outside the treater-room door, were not in a state of good and substantial repair at the commencement of the term.

In *Proudfoot v. Hart* (1890), 25 Q.B.D. 42, the obligation of the tenant was in terms as follows: "during the said term [to] keep the said premises in good tenantable repair, and so leave the same at the expiration thereof." It was conceded that the

premises were not in tenantable repair when the tenancy commenced, and it was argued on behalf of the tenant that because they were not in tenantable repair the tenant was not obligated to put them in tenantable repair. It was held that the tenant's obligation was to put and keep the premises in such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a tenant of the class that would be likely to take it. At p. 50 Lord Esher M.R. put it thus:

" . . . it has been decided—and, I think, rightly decided—that, where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair."

In *Proudfoot v. Hart* and in such other English cases as *Payne v. Haine* (1847), 16 M. & W. 541, 153 E.R. 1304; *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905 and *Calthorpe v. McOscar et al.*, [1923] 2 K.B. 573 and in appeal *sub nom. Anstruther-Gough-Calthorpe v. McOscar et al.*, [1924] 1 K.B. 716, all of which were relied upon by counsel for the appellants, the covenant to repair was absolute. Here it is subject to a limitation and because of that limitation it is impossible to give to this covenant a meaning equally extensive with the meaning of the covenants in those cases.

A building cannot at one and the same time be in a state of good and substantial repair and also in a state of non-repair. A covenant that imposed upon a tenant the duty to *put* a building in a state of good and substantial repair, except the present non-repair, would be meaningless and it would make no difference how that non-repair had been caused. Therefore, the covenant with which we are here concerned cannot be construed as imposing on the tenant a duty to *put* the premises in a state of good and substantial repair. The respondent's duty under this covenant was to *keep* the premises in the state of repair in which they were at the commencement of the term, excepting only such non-repair as might be caused during the term by reasonable wear and tear, fire, lightning and/or tempest.

The respondent is, therefore, not liable for the cost of removing the wax from the annex, because no wax was deposited

in that area during the term of the lease. Neither is the respondent liable for the condition in the treater-room at the termination of the lease because, though it caused wax to be deposited in that area during the term, the condition at the end of the term was not appreciably worse than at the beginning.

I think, however, that some liability attaches to the respondent for the condition existing at the termination of the lease in the area outside the treater-room where the additional treater had been installed in December 1948.

In the treater-room itself some efforts had been made by the respondent at least to minimize the deposits of wax. The boundaries of the treater-room were as follows: on the north was an outside wall of the building; on the east and west were wooden partitions lined with gyproc; on the south was another fibre-board wall with two sliding doors. Three treaters were in operation in that room. An exhaust-fan, of a capacity recommended to the respondent as being sufficient to carry fumes from the products produced by three treaters, was installed in the north wall. In the south wall was another fan built into the fibre-board partition, so that there would be a current of air running from south to north. It was stated by Mr. Currie in his evidence that at times they found it unnecessary to keep the fan in the southern wall running.

The additional machine was installed completely outside the treater-room. A hole was cut in the southerly wall of the treater-room and the nose of the machine placed up against that hole. There is evidence that after that hole was cut one could see, from outside the treater-room, through the hole and all the way across the treater-room. No further facilities were installed to take care of the extra escape of wax vapour that, to my mind, was inevitable as a result of the installation and operation of the additional treater machine. In my opinion that was not reasonable user of that particular part of the plant.

It is impossible to determine precisely from the evidence how much of the total amount spent by the appellants in removing wax should be allocated to the area outside the treater-room. Rather than direct a reference to determine that amount, I have concluded that an allowance of \$300 would be reasonable.

So far as the allegation of non-repair to the floors is concerned, I would not interfere with the judgment below. It was in the contemplation of the parties that heavy machinery would be located in these premises. Indeed, the appellants saw the various machines actually installed and operating before they purchased the building. All those machines required oil and grease—some more than others. Drip-pans had been placed where there was liable to be dripping. Those pans may not have caught all the oil that dripped, but I am not prepared to hold that, having regard to the use to which the respondent was entitled to put the premises so far as this machinery was concerned, the condition of the floors of which the appellants now complain was brought about by a user that was unreasonable.

Around a drinking-fountain in a factory there is bound to be some splashing of the floor. Careless and inconsiderate employees may on occasions throw the remnants from drinking cups on the floor. An employer cannot be always on the alert to guard against that conduct. Those circumstances are almost necessarily incidental to the use of the fountain, in such premises. Moreover, there is evidence that on occasions, due to heavy rains, the drain from the fountain backed up and flooded the floor.

No doubt as a result of the use of trucks with ordinary iron wheels, some sections of the floor were gouged or the tongues in some boards were split. However, I am not prepared to hold that the use of such trucks was unreasonable. It must be remembered that this building was designed for manufacturing purposes, even heavier than the particular type of industry carried on by the respondent. In such a building, in a measure proportionate to the type of industry therein operated, wooden floors are certain to deteriorate by user. This building is about 20 years old and it is a fair inference that the condition of the floors of which the appellants complain was not all caused during the two years and seven months that the respondent occupied the premises as the tenant of the appellants.

I would, therefore, allow the appeal in part by awarding to the appellants the sum of \$300 and directing that judgment be entered in their favour for such amount together with their costs of the trial on the County Court scale without set-off. The

appellants should also have their costs in this court as on an appeal from the County Court.

Appeal allowed in part.

Solicitors for the plaintiffs, appellants: Macdonell & Boland, Toronto.

Solicitors for the defendant, respondent: Salter, Reilly & Jamieson, Toronto.

[COURT OF APPEAL.]

Mackie v. The Canada Skate Manufacturing Company Limited.

Master and Servant — Master's Liability for Injury to Servant — Pre-existing Disease, Aggravated by Conditions of Employment — Duty Owed by Employer — Special Danger for Particular Employee — Volenti non fit injuria — Repeated Complaints by Servant.

M., a workman, died as a result of pulmonary emphysema, a disease not contracted as a result of his employment, but aggravated and advanced by the conditions of that employment. The medical evidence was to the effect that emphysema was unusual in a man as young as M., and it was never diagnosed in his case until after he had left his employment. The evidence further established that there was no known history of emphysema as an occupational disease among welders. The trial judge awarded damages to M.'s widow against his employer, on the ground that although the defendant had made its place of employment as safe as the exercise of reasonable skill and care would permit, and had complied with all relevant statutory provisions, yet it was under a duty to warn M. of the unusual danger to him resulting from his disease.

Held, the defendant was not liable in damages. Although the trial judge had rightly held that M.'s repeated complaints to his employer had not brought him within the maxim *volenti non fit injuria*, there was no evidence on which it could be held that the employer actually knew or should have known of M.'s condition and of the unusual danger caused thereby. Even if such knowledge could be imputed to the defendant, there was no foundation for a further inference that M. did not possess the knowledge himself. The danger was peculiar to M., for the trial judge had expressly found that the conditions of the employment would not have affected a healthy man.

The fact that the Workmen's Compensation Board had made an order, under s. 14 of The Workmen's Compensation Act, that the action was one "the right to bring which is not taken away by Part I of the said Act" did not remove the defendant's industry from that Part of the Act, but only declared that the widow's action was not barred by the Act. Since the industry was within Part I, and M. did not come within any of the exceptions set out in s. 120, it followed that s. 121 had no application to the action.

Judgment of Ferguson J., [1950] O.R. 683, reversed.

AN APPEAL by the defendant from the judgment of Ferguson J., [1950] O.R. 683, [1951] 1 D.L.R. 226.

2nd May 1951. The appeal was heard by ROBERTSON C.J.O. and AYLESWORTH and MACKAY JJ.A.

C. F. H. Carson, K.C. (G. H. Lochead, with him), for the defendant, appellant: On this appeal we do not think it necessary to challenge the trial judge's finding that Mackie's emphysema was aggravated and advanced by the conditions of his employment, since there was some evidence on which that finding could be made. Nor do we question the trial judge's opinion that proof of compliance with The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194, and the regulations made thereunder, is not conclusive in our favour.

We also accept as correct the principle of law on which the judgment was based, *viz.*, that "it is the duty of the employer not only to make the place of employment as safe as the exercise of [reasonable] care and skill will permit but to warn the employee of all unusual dangers known to the employer", subject to the qualification that the warning is required only in respect of dangers not known to the employee himself. We submit, however, that the trial judge erred in the application of this principle to the facts of this case.

The negligence alleged in the statement of claim was a failure to make the place of employment safe for Mackie; there was no allegation of negligence in failing to warn him of an unusual danger.

The trial judge seems to have held that the defendant knew that there was unusual danger to Mackie because Mackie had complained about his working conditions. If, however, the knowledge is to be presumed because of these complaints, then it must be held that Mackie had at least as much knowledge as the defendant. The learned trial judge, however, was of the opinion that Mackie did not have knowledge of the nature and extent of the risk, which must mean that he did not know of the unusual danger. If Mackie did not know of the danger, it would be strange if the defendant were expected to know of it merely because of Mackie's complaints.

It is important to note that the unusual danger did not arise from some peculiarity of the equipment in the factory, of which the defendant might be expected to have a better knowledge than Mackie. It arose from the physical condition of Mackie himself. In the absence of knowledge on the part of the defendant, which knowledge was not possessed by Mackie, as to the significance of Mackie's symptoms, there can be no possible

foundation for the judge's finding that the defendant knew that Mackie's working conditions were unsafe but that Mackie himself did not have that knowledge. Mackie would naturally have a better knowledge of the effect on him of his working conditions than the defendant could have. If the defendant knew of the unusual danger, as the trial judge found, then *a fortiori* Mackie would know of it, and there could be no duty on the defendant to warn Mackie of something he already knew.

We submit therefore that there is no evidence whatever to support the finding that the defendant knew that Mackie's working conditions constituted an unusual danger to him, and we further submit that there is nothing to support a finding that we ought to have known. The evidence is all the other way.

In view of the rarity of the disease, it could hardly be suggested that the defendant should have had knowledge of it, let alone recognize the symptoms in Mackie. If the judgment is to be construed as including a finding that in the circumstances of this case the defendant ought to have known that Mackie's working conditions constituted an unusual danger for him, the implication would be that there was a duty on the defendant to call in a medical expert to examine Mackie and determine whether his working conditions amounted to an unusual danger. The learned trial judge did not suggest that there was any such duty, and there is no authority whatever for imposing any such duty on an employer.

The judgment at trial proceeded on the basis that there was a twofold duty on us: first, to "make the place of employment as safe as the exercise of [reasonable] care and skill will permit", and secondly, to "warn the employee of unusual dangers known" to us but not to the employee. We submit that there was no evidence to support the finding that we failed to discharge the second of these duties. The trial judge found as a fact that the fumes from the machines would not have affected a healthy man, and that we had complied with the statute and regulations. There was no suggestion in the evidence that we should, or could, have taken any further steps to improve Mackie's working conditions. Every item of equipment he asked for appears to have been given to him, even though such equipment was not normally furnished and other welders did not want it.

The general principles of a master's liability at common law in case of injury to or death of a servant are set out in 22 Halsbury, 2nd ed. 1936, pp. 187-195, and the duty of a master towards a servant suffering from a particular disability is dealt with in *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42.

Wilfred Judson, K.C., for the plaintiff, respondent: The trial judge properly found that the conditions of Mackie's employment, although they did not cause his illness, did accelerate his death, and he correctly stated the twofold duty of an employer: Halsbury, *loc. cit.* (para. 314); Charlesworth, Law of Negligence, 2nd ed. 1947, p. 516. The duty of care is a particular duty to each particular employee: *Paris v. Stepney Borough Council*, *supra*. The meagre efforts made by the defendant to alleviate the conditions complained of were not an adequate discharge of this duty. The trial judge was clearly right in finding that Mackie was not *volens*.

We proved a case within s. 121 of The Workmen's Compensation Act, R.S.O. 1937, c. 204. Mackie suffered personal injury by reason of a defect in the condition or arrangement of the machinery or equipment in the defendant's factory. Section 121 imposes liability on the employer irrespective of negligence: *Lewis v. Nesbit & Auld Ltd.*, [1933] O.R. 595, [1933] 3 D.L.R. 414, reversed [1934] S.C.R. 333, [1934] 3 D.L.R. 241. The order of the Workmen's Compensation Board of 9th February 1950 declared that the right of action was not taken away by Part I of the Act, and we are therefore entitled to invoke s. 121, since the effect of the order is that the defendant's industry is not one to which Part I applies. It is true that the action was pleaded and argued as one of negligence, but the fact that the plaintiff assumed a heavier burden than she need have done does not preclude us from relying now on s. 121 of the Act.

C. F. H. Carson, K.C., in reply.

Cur. adv. vult.

13th September 1951. The judgment of the Court was delivered by

AYLESWORTH J.A.:—Defendant appeals from the judgment of Ferguson J. delivered 1st September 1950: [1950] O.R. 683. The respondent is the widow of the late Harvey Mackie and

brought this action against the appellant under the provisions of The Fatal Accidents Act, R.S.O. 1937, c. 210, for her own sole benefit. She recovered the sum of \$2,500 and costs. After institution of the action the Workmen's Compensation Board made an order under s. 14 of The Workmen's Compensation Act, R.S.O. 1937, c. 204, declaring the action to be "an action the right to bring which is not taken away by Part I of the said Act". The provisions of that section make the declaration final and conclusive.

The respondent carries on a skate-manufacturing business at Kitchener, Ontario, where it employed Mackie from August 1934 until November 1942 as a spot welder, welding skate-blades to tubes, for the entire period of his employment with the exception of the last few months, during which few months he was engaged upon inspection work. Six years later, and at the age of 46, he died of cardiac failure induced by pulmonary emphysema. The disease is thus described by the learned trial judge:

"Emphysema is a disease which attacks the lungs. It sometimes attacks other parts of the body, but in this case I am only concerned with the lungs. The chief physical indication of the disease is loss of elasticity in the chest and marked shortness of breath. In the advanced stages the chest balloons out, permitting practically no chest expansion. The disease, as it progresses, obliterates the air cells, or alveoli, in the lungs, causing an increasing shortness of breath, resulting in heart failure and death to the sufferer."

The learned trial judge found that "the disease, emphysema, from which Mackie suffered, was not caused by any neglect or default of the defendant and in fact it was not caused by anything with which Mackie came in contact in the defendant's factory" but he also found that the disease was "aggravated and advanced" by "the conditions of employment". The conditions of employment to which reference was thus made consisted of fumes or smoke germinated in the welding process carried on by Mackie. Neither party challenges these findings of fact.

As one of the defences put forward at the trial, the defendant pleaded the doctrine *volenti non fit injuria*. This defence was not successful and again I quote in part from the reasons for judgment:

"I am of the opinion that Mackie did not have knowledge of the nature and extent of the risk and that he neither expressly nor by implication intended to exempt the defendant from any liability for any injury caused to him."

This defence had been put forward by reason of the fact that Mackie, during the course of his employment, had complained on numerous occasions of coughing and of the smoke. In this connection Mackie, at various times, had requested changes in his working conditions by the supply to him personally, or by the addition to the machine at which he was working, of different pieces of additional equipment, with all of which requests the appellant complied. The appellant does not challenge the finding made against it upon the question of *volenti*.

What the appellant does challenge in this appeal is the finding of the learned trial judge that the appellant had a duty to warn Mackie of an unusual danger and failed in that duty. It will be useful to quote in full from that part of the reasons for judgment:

"I think that the defendant complied with The Factory, Shop and Office Building Act and the regulations, but that finding does not of itself show that the system of work was safe for Mackie, and indeed the defendant, having regard to Mackie's numerous complaints, knew, or ought to have known, that its system was unsafe for him. I think, therefore, that the defendant's compliance with the said statute and regulations does not relieve it from its common law duties: *Franklin v. The Gramophone Company, Limited*, [1948] 1 K.B. 542, 552, 560, [1948] 1 All E.R. 353.

"It is the duty of an employer not only to warn his employee against unusual danger known to him but also to make the place of employment as safe as the exercise of reasonable skill and care will permit, or, conversely, it is the duty of the employer not only to make the place of employment as safe as the exercise of skill and care will permit but to warn the employee of all unusual dangers known to the employer. I think the defendant knew that there was unusual danger for Mackie and its officers failed to take the precaution of warning him of it. Their compliance with the Factory Act regulations was not sufficient. In consequence of the defendant's breach of duty the conditions under which Mackie worked contributed to the disease from which he suffered. I hold that but for the develop-

ment of the disease, caused by its being aggravated, his death would not have taken place when it did."

Before referring to the evidence relevant upon the point, I desire to make certain observations as to the finding itself. The respondent in her pleadings did not put forward her case upon any such ground. She pleaded that Mackie had contracted emphysema as a result of his employment and as a result of the negligent operation by the appellant of its plant and machinery, alleging as particulars of such negligence failure to provide proper ventilation, a proper exhaust system, protection to Mackie against the result of fumes, failure to follow generally-approved manufacturing practice and to exercise reasonable and proper care to protect its employees. This different ground of negligence as pleaded was pressed vigorously at trial, as is apparent from the argument of respondent's counsel in opposition to a motion which was made for a non-suit; counsel really put forward, as a main ground of negligence, alleged failure on appellant's part in not providing safeguards "to do away with" the smoke reaching Mackie. Evidence was led on behalf of appellant to show that its installations and system not only complied with the relevant regulations but were efficient and adequate according to the known and approved standards in the industry and there was no evidence to indicate what, if anything, should have been done, which in fact was not done, to alter or improve the working conditions. While the learned trial judge did not expressly rule that the appellant had made its place of employment as safe as the exercise of reasonable skill and care would permit, I am not by any means prepared to assume that he overlooked or failed to consider this very ground which respondent put forward in her pleadings and emphasized at the trial. In any event, upon the whole of the evidence I think the respondent completely failed to discharge the onus which was upon her as plaintiff to establish that ground of negligence.

I turn now to a consideration of the evidence as to the finding against the appellant that it failed in a duty which was upon it to warn Mackie of the unusual danger to him of the fumes.

A number of eminent medical experts were examined at length as to the possible effect upon Mackie of the fumes in

question. Those experts do not agree; some of them were of the opinion that since Mackie was suffering from emphysema, the fumes had proven to be an irritant to him of sufficient severity to increase his coughing and thereby to aggravate or accelerate the progress of his disease; others of the experts expressed an opinion exactly to the contrary. As early as 1936, and continuing until 1942, Mackie took frequent treatments from an osteopath, a Mr. MacKenzie. Mr. MacKenzie deposed that in his four-year course to qualify him as an osteopath he had been required to include courses such as are prescribed in a standard medical college for the diagnosis of lung diseases, and that at least upon one occasion in 1939 he had examined Mackie "so far as his lungs were concerned". He made no diagnosis of emphysema and his evidence does not reveal that he at any time warned Mackie of any possible danger to him from his working conditions. In 1938 Mackie had consulted a physician in Kitchener but that physician did not diagnose Mackie's trouble as emphysema and here again there is no evidence of any suggestion to anyone that Mackie's working conditions were dangerous to him. In fact the first diagnosis of emphysema occurred in 1942 after Mackie had ceased to be employed by the appellant. This diagnosis was made in Hamilton by Dr. Page of that city. Furthermore, the medical evidence clearly established that it was most unusual for a person of Mackie's age to contract emphysema; in nearly all cases the disease is found in persons of considerably greater age. The evidence establishes that there is no known history of emphysema as an occupational disease to be found in welders. Moreover, there is no suggestion in the evidence that Mackie's symptoms of coughing and spitting and shortness of breath were or are readily recognizable or even significant as symptoms indicating emphysema.

Upon these facts, and with great respect, I find myself in complete disagreement with the learned trial judge as to the duty which he has found to have been upon the appellant. The unusual danger to Mackie arose only because of his peculiar and, from the medical viewpoint, surprising physical condition. Upon such evidence I do not think that there is any legal basis upon which the appellant can be held either actually to have known or to be under a duty to know of "the danger to Mackie". Even inferring, and I am not prepared to make the inference,

that Mackie's complaints to the appellant should have brought or did bring home to the appellant knowledge of the unusual danger to Mackie, there would then seem to be no foundation for the further inference that Mackie himself did not possess that knowledge. Indeed, one would think that, of the two Mackie rather than the appellant would be in the better position to realize the danger to him of the fumes. It is well established that this danger was peculiar to himself alone for we have it in evidence, and the trial judge so finds, that the fumes would not affect a well man. I therefore find that the learned trial judge was wrong in attributing negligence to the appellant in failing to warn Mackie of this unusual danger to him.

There remains a further aspect of the appeal raised by the respondent. The respondent argues that negligence on the part of the appellant need not be demonstrated to entitle respondent to judgment but that all that need be shown is that "personal injury [has been] caused to a workman [Mackie] by reason of [a] defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer [the appellant]", and refers to s. 121 in Part II of The Workmen's Compensation Act. My quotations are quotations in part from that section.

Section 120 of the Act reads in part as follows: . . . "sections 121 to 123 shall apply only to the industries to which Part I does not apply and to the workmen employed in such industries, but outworkers and persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business, who are employed in industries under Part I but who are excluded from the benefit of Part I, shall not by this section be excluded from the benefits of sections 121 to 123."

It is not disputed that the appellant in fact is an industry to which Part I does apply and that in fact it falls within the industries listed in class 10 of schedule I of the Act. It is to be observed that certain employees, namely, outworkers and persons whose employment is of a casual nature, are, by the section, to have the benefit of s. 121 in certain circumstances, despite the fact that such employees are employed in industries under Part I, but no other employees employed in an industry to which Part I applies are given this benefit. The order made by the Workmen's Compensation Board under s. 14 does not

remove the appellant from the operation of Part I of the Act; it merely declares that respondent's action is not barred by Part I. If this view of the matter is the correct one, then s. 120 is a sufficient answer to the submission put forward by the respondent. I am also of the further opinion that upon the evidence the respondent has failed to demonstrate that the personal injury was caused by reason of any "defect" as mentioned in s. 121. Clearly, I think, the defect was one peculiar to Mackie himself—the unusual disease from which he was suffering—and was not in any sense a defect "in the condition or arrangement of the ways, works, machinery, plant, buildings or premises" of the appellant.

I would allow the appeal and dismiss the action. During the argument counsel for the appellant stated that, in the event of success, no order as to costs either here or below was requested and, accordingly, I would make no order either as to costs of the appeal or of the action.

Appeal allowed without costs.

Solicitor for the plaintiff, respondent: Harold L. Daufman, Kitchener.

Solicitors for the defendant, appellant: Sims, Bray, Schofield & Lohead, Kitchener.

[COURT OF APPEAL.]

Rex ex rel. Fletcher v. Bridge.**Rex ex rel. Skalinsky v. Bridge.**

Municipal Corporations — Early-closing By-laws — Validity — Whether Delegation of Powers — The Factory, Shop and Office Building Act, R.S.O. 1950, c. 126, ss. 83(3), 84.

On appeal from a conviction for a violation of an early-closing by-law applicable to gasoline service-stations, an attempt was made to distinguish the by-law from that considered in *Rex ex rel. Fletcher v. Joy Oil Co. Limited*; *Rex ex rel. Press v. Joy Oil Co. Limited*, [1950] O.R. 766, followed by the trial judge.

Held, the by-law was in essential respects indistinguishable from that considered in the *Joy Oil* case, *supra*, and in particular it did not contain any unauthorized delegation of power by the city council, and the convictions should therefore be affirmed.

APPEALS from judgments of Kinnear Co. Ct. J., in the County Court of the County of Wentworth, affirming two convictions by a justice of the peace.

4th and 5th September 1951. The appeals were heard by HENDERSON, ROACH and GIBSON JJ.A.

J. A. Sweet, K.C., for the appellant: Section 84 of The Factory, Shop and Office Building Act, R.S.O. 1950, c. 126, originally enacted as s. 82*a* by 1948, c. 27, s. 2, is entirely innocuous and has no validity whatever. It refers to "the retail gasoline service industry as defined in *The Industrial Standards Act*", and at the time when the section came into effect (31st March 1948) The Industrial Standards Act, then R.S.O. 1937, c. 191 (now R.S.O. 1950, c. 179), contained no definition of that term. It is true that a definition was inserted into the Act by 1948, c. 47, s. 1, but that section did not come into force until 1st May 1948. Since there was no definition in existence when s. 82*a* came into force it is meaningless, and the subsequent coming into force of the other amending Act cannot make it operative, even though By-law 6300 of the City of Hamilton, with which we are here concerned, was not passed until 26th October 1948.

The trial judge considered that she was bound by the decision in *Rex ex rel. Fletcher v. Joy Oil Co. Limited*; *Rex ex rel. Press v. Joy Oil Co. Limited*, [1950] O.R. 766, [1951] 1 D.L.R. 632, 98 C.C.C. 161, 11 C.R. 169, but my submission is that this by-law is distinguishable from the by-law considered in that case, and contains several matters of improper delegation of power by the city council:

(1) The city clerk has a discretion to determine the number of hours (within prescribed limits) for which special permits may be granted, and this is an important matter of policy, that cannot be delegated by the council.

(2) "Extension permits" constitute a valuable privilege, and the council delegates to the city clerk the power to terminate or withhold a permit on evidence satisfactory to him of stated facts — he is given a quasi-judicial function, which cannot be done unless it is clearly authorized by the statute. [ROACH J.A.: Suppose the by-law had merely said that extension permits should be granted to operators except those who had failed to remain open?] I concede that that would have been good, under the *Joy Oil* case, *supra*, but the determination would have to be made by the council, and not by the city clerk: 7 C.E.D. (Ont.), 1st ed. 1931, p. 980; Meredith and Wilkinson, Canadian Municipal Manual, 1917, p. 265; *Forst v. City of Toronto* (1923), 54 O.L.R. 256 at 279. This provision cannot be supported, as the trial judge did, by comparing it with the provision as to revocation in the Toronto by-law.

(3) The city clerk has a great and important discretion as to "emergency service permits", in that there is no definition of "emergency" in the by-law, and it is left to the clerk to determine what types of service can be rendered. Further, there is here again a provision for withholding on evidence satisfactory to him.

Apart from delegation, this by-law is bad because it cannot help, mathematically, being discriminatory: I refer to the provisions of s. 7.

The by-law is also unenforceable because it is too vague as to the scheme of rotation to be adopted. It may be that it is as well drafted as such a by-law can be, but that fact does not make it good.

This is a by-law restricting the common law right to trade, and regulating an essential industry. The Court must therefore be vigilant, in construing it, to see that it is fully authorized by legislation.

F. A. Brewin, K.C., for the informants, respondents: The definition was in effect, though not operative, when the 1948 amendment to The Factory, Shop and Office Building Act came into force, and in any event both statutes were in force when the

by-law was passed. [THE COURT: You need not deal further with that submission.]

As to delegation, I rely entirely on the *Joy Oil* case, *supra*, and submit that this by-law is indistinguishable. The principle there laid down is applicable to all the arguments advanced in this appeal, and no distinction has been suggested that affects that principle.

(1) On a proper interpretation of the by-law no discretion is given to the city clerk as to hours. The words of the by-law follow the precise words of what is now s. 84(3). In any case, even if there is such a discretion, the validity of the by-law is not affected.

(2) It is true that there is no such provision as this explicitly set forth in the Toronto by-law, but it does give a discretion as to the issuing of permits, and all that the Hamilton by-law does is to legislate as to the persons from whom (on perfectly rational grounds) permits are to be withheld. The discretion under the Hamilton by-law is in fact narrower, because of these limitations, than that under the Toronto by-law.

[THE COURT: You need not deal with the arguments that the by-law is discriminatory and that it is too vague to be enforceable.]

J. A. Sweet, K.C., did not reply.

Cur. adv. vult.

24th September 1951. The judgment of the Court was delivered by

ROACH J.A.:—The appellant in these two appeals was convicted by a justice of the peace at the city of Hamilton on each of two informations laid against him, the one by Douglas Fletcher, the other by Edward Skalinsky, each charging a breach of By-law 6300 of the City of Hamilton.

The summons issued as a result of the information laid by Fletcher charged that the appellant, on the 5th March 1951, did unlawfully fail to close the retail gasoline service-station of which he was the occupier or person in charge, and keep the same closed, between the hours of 7 o'clock in the afternoon of Monday 5th March 1951 and 7 o'clock in the forenoon of the following day.

The summons issued as the result of the information laid by Skalinsky charged precisely the same offence.

The conviction on the Skalinsky information is for the offence as described in the summons.

The conviction on the Fletcher information is for the offence as described in the summons, with the following particulars which were not in the summons, although they were in the original information, namely, "by serving customers at 8.04 P.M. or thereabouts".

From those convictions the appellant appealed to the County Court of the County of Wentworth. The appeals were heard by Her Honour Judge Kinnear, who, for reasons stated in writing, dismissed both appeals.

From those dismissals the appellant, by leave granted by Mr. Justice Hope, now appeals to this Court, and the two appeals were argued together.

From the records it does not appear on which charge the appellant was first convicted. During the argument in this court, and, as would appear from the reasons of the learned County Court Judge, also in that court, the Court raised the question of *autrefois convict*. In the court below and in this court, however, counsel for the appellant waived that question and stated that he was prepared to stand or fall on the question of the validity of the by-law. As a result no argument was addressed to either Court on the question of *autrefois convict*. Accordingly, I am content to dispose of both appeals on the sole ground upon which counsel for the appellant relied.

By-law 6300 was passed by the municipal council of the City of Hamilton on the 26th October 1948. The by-law itself states that it is enacted pursuant to the provisions of ss. 82(3) and 82a of The Factory, Shop and Office Building Act (now R.S.O. 1950, c. 126, ss. 83(3) and 84).

The Factory, Shop and Office Building Amendment Act, 1948, c. 27, came into force on 31st March 1948. It amended the original Act, then R.S.O. 1937, c. 194, by adding thereto s. 82a, which is as follows:

"In addition to any matter authorized by section 82, any by-law thereunder applicable to retail gasoline service stations, gasoline pumps and outlets in the retail gasoline service industry as defined in *The Industrial Standards Act* may,—

“(a) provide that the by-law shall apply only in the portion or portions of the municipality designated in the by-law;

“(b) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and

“(c) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.”

“Retail gasoline service industry” was first defined by s. 1 of The Industrial Standards Amendment Act, 1948, c. 47. That section came into force on 1st May 1948.

The argument was addressed to this Court that s. 82a of The Factory, Shop and Office Building Act was really innocuous because the provisions thereof relate only to “the retail gasoline service industry as defined in *The Industrial Standards Act*”, and the term was not so defined when The Factory, Shop and Office Building Amendment Act came into force, but was so defined only when The Industrial Standards Amendment Act came into force on 1st May 1948. Counsel put his argument thus, namely, that the words “as defined in *The Industrial Standards Act*” should be construed as meaning “as presently defined in *The Industrial Standards Act*”.

I would not give effect to that argument. The two amending Acts were both passed at the same session of the Legislature, the one coming into force one month earlier than the other. The construction which should be placed upon the relevant words is that which would give effect to the plain intention of the Legislature. It was plainly the intention of the Legislature that the definition in The Industrial Standards Amendment Act should apply.

I pass now to the question of the validity of By-law 6300, and I first reproduce therefrom the sections thereof to which counsel’s argument applied:

"Closing Hours.

"4. During the whole of the year, all gasoline shops shall, save as hereinafter in this By-law otherwise provided, be closed and remain closed:—

"(a) Between seven of the clock in the afternoon of each Monday, Tuesday, Wednesday, Thursday and Friday, respectively, and seven of the clock in the forenoon of the next following day; and

"(b) Between seven of the clock in the afternoon of each Saturday and seven of the clock in the forenoon of the next following Monday.

"Permits to Stay Open.

"5. Notwithstanding the provisions of section 4 hereof the City Clerk may, on the recommendation of the Property and License Committee, issue permits authorizing those gasoline shops for which such permits are issued, to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit.

"Idem.

"6. Each said permit issued shall be either:—

"(1) An Extension Permit, which shall authorize the gasoline shop for which it is issued to be and remain open notwithstanding the By-law, during the part or parts of the day or days specified in the permit, which,

"(a) In that part of the year from the first day of May until the last day of October, inclusive, shall be during the hours between seven of the clock in the afternoon and ten of the clock in the afternoon of Monday, Tuesday, Wednesday, Thursday, Friday and Saturday of the week for which the permit is issued, and during the hours between ten of the clock in the forenoon of the preceding Sunday and seven of the clock in the afternoon of the said Sunday; and

"(b) In those parts of the year from the first day of November in each year until the last day of April in the following calendar year, inclusive, shall be during the hours between ten of the clock in the forenoon and five of the clock in the afternoon of the Sunday for which the permit is issued; or

"(2) An Emergency Service Permit, which shall authorize the gasoline shop for which it is issued to be and remain open for emergency service only, notwithstanding the By-law, during

the part or parts of the day or days specified in the permit, which, throughout the year, shall be during those hours on Sunday, Monday, Tuesday, Wednesday, Thursday, Friday and Saturday of the week for which the permit is issued, commencing at twelve of the clock in the afternoon of the preceding Saturday, when the gasoline shop for which the permit is issued would otherwise be required by the provisions of this By-law to be and remain closed.

"Proportion of Extension Permits.

"7. (1) Extension Permits issued pursuant to the provisions of sub-clause (1) of section 6 shall, for each week for each Sunday as the case may be, be issued in such number as most nearly approximates twenty-five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk, and shall be issued in rotation to those occupiers of gasoline shops who are entitled to Extension Permits as hereinafter provided, so that each shall receive at least one such Extension Permit in each calendar month;

"(2) The occupiers of all gasoline shops in the city shall be entitled to Extension Permits, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits, on more than three days or on more than one Sunday in the current calendar year, in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Extension Permits.

"Proportion of Emergency Service Permits.

"8. (1) Emergency Service Permits issued pursuant to the provisions of sub-clause (2) of section 6 shall, for each week, be issued in such number as most nearly approximates five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk, and shall be issued in rotation to those occupiers of gasoline shops who are entitled to Emergency Service Permits as hereinafter provided;

"(2) The occupiers of all those gasoline shops in the city shall be entitled to Emergency Service Permits, who file notice in writing with the City Clerk that they wish to receive the same, except those occupiers who, according to evidence satisfactory

to the City Clerk, have failed to keep their gasoline shops open for emergency service only during the whole of the time or times so authorized by such permits, on more than three days in the current calendar year, in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Emergency Service Permits.

"Schemes of Rotation.

"9. Schemes of rotation of Extension Permits or of Emergency Service Permits or both, submitted by the majority of occupiers of gasoline shops in the City of Hamilton may be considered by the Property and License Committee in coming to a decision for recommending issuance of such Extension Permits or Emergency Service Permits or both."

Having quoted those sections, reference may now be made to the judgment of this Court in *Rex ex rel. Fletcher v. Joy Oil Co. Limited*; *Rex ex rel. Press v. Joy Oil Co. Limited*, [1950] O.R. 766, [1951] 1 D.L.R. 632, 98 C.C.C. 161, 11 C.R. 169. The by-law there in question was a by-law passed by the municipal council of the City of Toronto. In due course I shall refer to certain sections of that by-law which counsel contrasted with sections of the Hamilton by-law. First, however, it is desirable to refer to the reasons of this Court in that case, and to reaffirm what this Court there said as to the interpretation and effect of s. 82a of The Factory, Shop and Office Building Act. Laidlaw J.A., writing the judgment of this Court, said at p. 778:

"If it was the intention of the Legislature to give to the council of a municipality, and to no other person or authority, the absolute discretion as to the persons and the times to be excepted from the by-law requiring gasoline service stations, pumps and outlets to remain closed, such intention could and no doubt would have been made plain in a simple manner by the use of express language. In the absence of such language I cannot conclude that the Legislature intended that every application for a permit to keep a gasoline station, pump or outlet open, notwithstanding a by-law requiring such places to remain closed, should be the subject of consideration and action by the council of a municipality. The inconvenience which would be caused to the council of a municipality, to the applicants for permits, and to the public generally by such a procedure and system would

be known and appreciated by the legislators, and in my opinion they would regard such procedure and system as impractical.

"It is my view that the intention of clause *c* of s. 82*a* of The Factory, Shop and Office Building Act was to empower the council of a municipality to establish a system for the issuing of permits which would not require an application to be the subject of consideration and action by it but rather by some subordinate agency or authority subject to the regulations and control of the council."

Counsel for the appellant sought to distinguish certain provisions of the by-law here in question from provisions in the Toronto by-law.

In particular it was argued that s. 6 of the Hamilton by-law purports to give to the city clerk certain discretionary powers which the council had no authority under the statute to delegate to him, whereas, under the Toronto by-law, so it was argued, no such discretionary powers were delegated to the chief constable. I have already quoted s. 6 of the Hamilton by-law. Section 6 of the Toronto by-law was as follows:

"(1) Notwithstanding anything heretofore contained in this by-law the Chief Constable is hereby authorized to issue, upon the recommendation of the said Committee, permits to allow certain gasoline service stations to be and remain open during the part or parts of the day or days specified in the permit which permit may only be issued in accordance with certain regulations and restrictions as follows, namely:

"(a) Permits for Sunday may be issued only for the period ten of the clock in the forenoon to five of the clock in the afternoon during the months of January, February, March, April, October, November and December and from nine of the clock in the forenoon to four of the clock in the afternoon during the months of May, June, July, August and September.

"(b) Permits for Sunday shall not be issued to more than twenty per centum of those gasoline service stations participating in a rotary system of remaining open and not more than one Sunday permit shall be issued in any calendar month in respect to the same gasoline service station.

"(c) Permits may be issued for any part of any day or days to not more than five per centum of the gasoline service stations within the municipality for the supply of emergency service only.

“(2) Any such permit may be revoked at any time for cause.”

The distinction which counsel sought to make between s. 6 in each of the two by-laws was this, namely, that under the Toronto by-law the chief constable was authorized to issue permits for definite periods, and under the Hamilton by-law the city clerk could exercise a discretion as to what period during certain hours the permits might authorize the service-station or outlets to remain open. I do not so read the Hamilton by-law. As I read s. 6(1) (a) and (b) and subs. 2, an extension permit and an emergency service permit, respectively, if issued, shall be for the whole period referred to in the relevant sections, and not a part thereof. The words “during the hours between” are to be construed as meaning during the whole period between the named hours. Although the wording in the two by-laws is slightly different, the meaning is the same.

Next it was argued that the words “according to evidence satisfactory to the City Clerk”, as they appear in s. 7(2) of the Hamilton by-law, give to the city clerk an uncontrolled and un-reviewable discretion, by the exercise of which he alone determines whether or not the occupiers of certain gasoline service-stations may receive extension permits, and that there is nothing comparable to such a power in the Toronto by-law. That argument overlooks the important fact that, by s. 5 of the Hamilton by-law, all permits are issued only on the recommendation of the property and license committee. If the occupier of a gasoline service-station should feel himself aggrieved by any action of the city clerk under s. 7(2), there will be nothing to prevent him from laying that grievance before the property and license committee; s. 5 of the by-law gives to that committee an overriding control similar to the control over the chief constable by the advisory committee, in the Toronto by-law. I do not think there is any greater discretion placed in the city clerk in Hamilton under this by-law than there is in the chief constable under the Toronto by-law.

In my opinion this by-law, notwithstanding the alleged distinctions to which counsel pointed between it and the Toronto by-law, comes within the power granted by the statute to the municipal council to “provide for the issue of permits”.

It was urged before us that this by-law restricts the common law right of the occupiers of gasoline stations to trade, and that,

therefore, the legislation must be construed strictly. That same argument was presented to the Court of Appeal in the *Joy Oil Co.* case and was answered by this Court, per Laidlaw J.A. in the language which I have earlier quoted.

Before parting with these reasons perhaps in fairness to counsel for the appellant I should refer to another argument which he presented to the Court, namely, that while the by-law refers to the granting of an emergency service permit, it does not define an emergency, and that it necessarily leaves to the clerk of the municipality the power to define, in the permit, the type of service that may be rendered by the occupier of a service-station under an emergency service permit. There will be full compliance with s. 6(1) (2) of the by-law, which deals with an emergency service permit, if such permit simply states in the terms of the by-law that it is issued for emergency service only, and the clerk is not called upon to define the scope of such emergency service. If an occupant of a service-station to whom an emergency service permit is granted extends service which those charged with the responsibility of enforcing the by-law consider amounts to more than emergency service, they may consider it their duty to prosecute the occupier, and on a trial on that charge it will become the duty of the Court trying the accused to determine whether or not the circumstances in fact amounted to an emergency. The failure to define the word does not invalidate the by-law.

For the foregoing reasons these appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant: Joseph A. Sweet, Hamilton.

Solicitors for the informants, respondents: Cameron, Weldon, Brewin & McCallum, Toronto.

[COURT OF APPEAL.]

Canada Permanent Mortgage Corporation v. The City of Toronto.

Pleadings—Amendment—General Rule as to Permitting Amendments—Exceptions to General Rule—Withdrawal of Admission—Prejudice—Rules 183, 184.

An admission made in pleadings or otherwise for the purpose of trial is a judicial admission, and the vital feature of a judicial admission is its conclusiveness upon the party making it. Although an admission may, in some circumstances and upon proper terms, be withdrawn by leave of the Court, this should never be permitted unless it is proved by satisfactory evidence that the fact admitted was not true. The withdrawal of an admission of fact in a pleading is not something for which the other side can be compensated in costs, and is therefore not within the general rule stated in *Williams v. Leonard et al.* (1895), 16 P.R. 544 at 549. *Delap v. Canadian Pacific R.W. Co.* (1915), 8 O.W.N. 293; *Wright v. Way* (1880), 8 P.R. 326; *Gesman v. The City of Regina et al.* (1907), 1 Sask. L.R. 39; *Wampler v. British Empire Underwriters Agency* (1920), 48 O.L.R. 428, quoted and applied.

Judgment of Kelly J., [1951] O.W.N. 574, reversed.

AN APPEAL, by leave of Spence J., from the order of Kelly J. allowing an appeal from an order of Conant, Senior Master. The reasons of Kelly J. and Spence J. are set out in [1951] O.W.N. 574.

19th September 1951. The appeal was heard by ROBERTSON C.J.O. and HOPE and BOWLBY JJ.A.

R. N. Starr, K.C., for the plaintiff, appellant: Not only was the writing of the letter admitted in the statement of defence, but it was again set out in the defendant's affidavit on production. We obtained leave to amend our statement of claim to plead laches, estoppel, ratification and other equitable principles after we had obtained partial production from the City. The order permitted amendment of the statement of defence, but my submission is that the purpose of this leave was merely to enable the defendant to reply as might be necessary to our amendments. The amended statement of defence not only did this, but went further and withdrew the prior admission that the letter had been written.

I can find no Ontario case as to how a party should plead to an amended pleading of his opponent, but it seems obvious that he should go no further than is necessary to reply to the amendment.

The affidavit filed by the defendant does not say that the letter was not written, and that the original admission was not true. Our position is prejudiced by the withdrawal of the ad-

mission, because without it we shall have to prove the letter at the trial, which may be a matter of some difficulty.

[BOWLBY J.A.: What right has the Court to interfere with the Master's discretion?] I submit there is none, and I so argued before Kelly J., but he did not give effect to my submission. [BOWLBY J.A.: The City, by its counter-motion, invoked the discretion, and it is difficult to see how it can now complain of the way in which that discretion was exercised.]

The general principle is that an admission, once made, cannot be withdrawn unless it is proved by satisfactory evidence that the fact admitted was not true. This is both good law and good sense, and if the rule did not exist there would be little finality to pleadings. The rule is so well established that Wigmore on Evidence, 3rd ed. 1940, s. 2590 (vol. 9), states that admissions of fact are judicial admissions. I rely also on *Greenwood v. Atkinson* (1830), 4 Sim. 54, 58 E.R. 22; *Livesey v. Wilson* (1812), 1 Ves. & B. 149, 35 E.R. 58; *Wright v. Way* (1880), 8 P.R. 326; *Chechik v. Bronfman et al.*, 18 Sask. L.R. 512 at 519, [1924] 2 W.W.R. 1165, [1924] 3 D.L.R. 1065; *Guinn v. Cully et al.*, [1941] O.W.N. 189. There is nothing here to prove that these admissions were not correct; on the contrary, there is actual evidence that they were true.

The whole defence is a technical one; substantially the defendant says, as to each of our allegations of fact, that what was done was done without authority. There is in general no objection to a technical defence, but in the circumstances of this case the defence, in view of the City's conduct over 40 years, is intellectually dishonest.

The power of amendment under Rule 183 is not to be exercised to enable a defendant to put technical difficulties in the plaintiff's way, when they do not go to the merits of the action, or to assist a litigant to obtain a dishonest advantage: *Wampler v. British Empire Underwriters Agency* (1920), 48 O.L.R. 428, 57 D.L.R. 88; *Witherspoon v. Township of East Williams* (1918), 44 O.L.R. 584, 47 D.L.R. 370.

The disadvantage to us cannot be compensated in costs. If worst comes to worst it may be necessary for us to call the city treasurer, and he would be a hostile witness. We have also lost a year's time that might have been given to a further attempt to find the letter.

J. Johnston, for the defendant, respondent: I admit that this letter is important. If it was written it should not have been. It was nine years before the decision in *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253, which finally decided that municipalities could act only by by-law, and lawyers were then not so sure as to the powers of municipalities. The only by-law in this connection was that providing for the original debentures, which specified that they were to be payable in sterling. When the affidavit on production was made the question of this letter had not come to the fore; doubt arose later as to whether it was written or, if written, delivered.

The affidavit on production was drafted in a solicitor's office, and the deponent might easily overlook this item. Mr. Lascelles could hardly know what was sent 40 years before, and no one else in his department would have knowledge of this matter. He probably simply accepted the affidavit as drawn by the solicitor. It was not until the plaintiff's examination for discovery that we discovered that the original letter was not available. The plaintiff may be able to prove this letter at the trial, but it should not escape the necessity for proving its case merely because of a slip on our part.

Before the Master the plaintiff based its argument on a firm rule that an admission, once made, cannot be withdrawn unless there is evidence that the admission was not in accordance with the facts. It is impossible to prove that in this case. This being the case, however, it follows that the Master's order was not made in the exercise of any discretion, but was made because there was no evidence to show that the admission was not true.

The order of Kelly J. was based on the proposition that the Court has a discretion to amend pleadings so that the trial of an action will not be governed by a solicitor's slip. There is no reason why this order should be interfered with. There is no injustice in the solicitor attempting to rectify his mistake or to rely on a weak point in his opponent's case, and put his case in proper shape, so that it can be tried on the proper facts. [BOWLBY J.A.: You originally admitted the letter but said that the person who wrote it had no authority to do so. You have a copy on file. Is the admission not therefore in accordance with the obvious facts?] The copy may have been merely a draft.

We want this feature of the case passed on by the trial judge, and do not want to be governed by the solicitor's hastily-made admissions. I rely on *Roe v. Davies* (1876), 2 Ch. D. 729 at 733.

Pleadings are often amended in the course of an action to fit the evidence; pleadings are only the frame of the action. If an admission like this could not be withdrawn except on positive proof of its incorrectness, no admission would ever be made. Such a ridiculous result should be avoided by the practice: *Smith v. Smith* (1884), 5 O.R. 690; *Northern Sulphite v. Occidental Syndicate* (1911), 2 O.W.N. 1015, 19 O.W.R. 69; *McQuade & Clark v. Moncrieff et al.*, [1929] 1 D.L.R. 984; *Peterkin v. MacFarlane et al.* (1878), 4 O.A.R. 25 at 46; *Tildesley v. Harper* (1878), 10 Ch. D. 393; *Steward v. North Metropolitan Tramways Company* (1886), 16 Q.B.D. 556; *Weldon v. Neal* (1887), 19 Q.B.D. 394; *McLeod v. Crawford* (1905), 6 O.W.R. 797 at 799; *Ormsby v. Township of Mulmur* (1916), 36 O.L.R. 566, 31 D.L.R. 76.

The order of the Master re-opened the pleadings and we took it that we could plead at large because the statement of claim was so completely changed. Our defence is not technical but the reverse, and goes to the substance of the whole action.

R. N. Starr, K.C., in reply: I refer to the following authorities as to pleading to an amendment: *Bowes v. Chaley* (1923), 32 C.L.R. 159; *Hawthorne v. Siegel* (1891), 88 Cal. 159, 22 Am. St. Rep. 291 at 296. *Greenwood v. Atkinson* (1830), 4 Sim. 54 at 63-4, 58 E.R. 22, is, I submit, still the law to-day. *Rex et al. v. Meilicke et al.*, [1937] 3 W.W.R. at 257, should not be followed, being based on a misinterpretation of the English Annual Practice.

Cur adv. vult.

4th October 1951. The judgment of the Court was delivered by

HOPE J.A.:—This is an appeal by the plaintiff by virtue of leave of Spence J., dated 5th June 1951, pursuant to Rule 493 from an order of Kelly J. dated 22nd May 1951, reversing an order of the Senior Master dated 9th April 1951, striking out paras. 4 and 6 of the amended statement of defence filed herein and restoring in place thereof paras. 4 and 6 appearing in the original statement of defence filed.

The original statement of defence contained, as paras. 4 and 6, statements which were an admission by the defendant that a certain letter dated 18th November 1911 had been written by the then City Treasurer of the defendant corporation to Messrs. G. A. Stimson and Company. The paragraphs in question read as follows:

"4. The defendant further admits that R. T. Coady who was the treasurer of The Corporation of the City of Toronto at the time in question wrote a letter dated November 18, 1911 to Messrs. G. A. Stimson and Company, stock brokers, Toronto, advising that the Corporation in order to suit the convenience of their client would make payment of principal and interest either at the Canadian Bank of Commerce, New York City, or the Bank of Toronto at Toronto instead of at London, England, at the par of exchange (9 ½ %) in regard to the debentures referred to in paragraph 3 hereof and the letter purported to have the corporate seal attached. This letter was not the act of the defendant and the said Coady had no authority to alter the terms of the debentures or to affix the seal of the corporation to the said letter, his powers in the latter regard being limited to those set out in section 20 by By-law No. 4295 of the defendant corporation. Accordingly the said letter had no binding effect on the defendant. Furthermore the letter could not be considered as part of the debentures because it did not comply with section 334 of the Municipal Act, chapter 266, Revised Statutes of Ontario 1937 and antecedent statutes. The defendant says that its Deputy City Treasurer Henry Reburn did write a letter dated June 1, 1936 to Mr. E. Reburn of Canada Permanent Mortgage Corporation enclosing a copy of the letter from Coady to G. A. Stimson and Company referred to above but the said letter was not the act of the defendant and had no binding effect on the defendant."

"6. In the alternative if it should be found that the letter of Coady was binding on the defendant, it did not bind the defendant to pay the principal and interest on the debentures when they became due in United States Dollars at the par of exchange for the pound as the plaintiff claims."

Subsequent to the delivery and filing of the original statement of defence, the plaintiff moved to amend its statement of claim.

Leave to do so was granted by the Senior Master on the 3rd January 1951. This order provided, *inter alia*, as follows:

"2. IT IS FURTHER ORDERED that the pleadings be and they are hereby re-opened and that the Plaintiff shall amend the Statement of Claim as aforesaid and serve an amended copy thereof upon the Defendant within 10 days from the date hereof, and the Defendant shall have 10 days from the date of service to file an amended Statement of Defence, and the Plaintiff shall have 10 days from the service of the said amended Statement of Defence, if any, to reply thereto."

The amended statement of claim, dated the 11th January 1951, was delivered and filed. The amendment effected thereby in no way related to the letter above mentioned. In the amended statement of defence, dated 30th January 1951, the defendant corporation amended paras. 4 and 6 of its original defence by withdrawing its admission that the letter referred to was written. The amended paragraphs read as follows:

"4. The defendant does not admit that its Treasurer wrote letters as set out in paragraph 5 of the said statement of claim and paragraph 9 of the amended statement of claim or that the seal of the Corporation was affixed. However if it should be proved that such letters were written and received by Stimson and Company such acts were not the acts of the defendant and the said treasurer had no authority to alter the terms of the debentures or to affix the seal of the Corporation to the said letter, his powers in the latter regard being limited to those set out in section 20 of By-law No. 4295 of the defendant corporation. Accordingly the said letters had no binding effect on the defendant. Furthermore the letters could not be considered as part of the debentures because they did not comply with section 333 of The Municipal Act, chapter 243, Revised Statutes of Ontario 1950 and antecedent statutes."

"6. In the alternative if it should be found that the said Treasurer wrote the said letters and that such letters are binding on the defendant, it did not commit the defendant to pay the principal and interest on the debentures when they became due in United States Dollars at the par of exchange for the pound, as the plaintiff claims."

Then followed the motion to the Senior Master by notice dated 31st January 1951 to strike out, *inter alia*, these para-

graphs from the amended statement of defence and to restore the paragraphs of corresponding numbers from the original pleading. The defendant, by notice dated 1st February 1951, launched a counter-motion asking the Master to exercise his discretion and allow the amended defence to stand in the place of the original defence. The order of the Senior Master dated 9th April 1951 makes no specific reference to the counter-motion and no separate order in respect thereof appears in the appeal book. The order was, however, granted as requested, striking out the paragraphs numbered 4 and 6 from the amended pleading and restoring the paragraphs of the same numbers from the original pleading. Thereupon, on an appeal heard by Kelly J., the last-named order of the Master was set aside.

The question on this appeal can be reduced to a very simple point, namely: May a litigant, having made an admission of fact in his pleading, be permitted to withdraw such admission from the record, and, if so, in what circumstances? The rule which still prevails was well stated by Street J. in *Williams v. Leonard et al.* (1895), 16 P.R. 544, affirmed 17 P.R. 73; 26 S.C.R. 406. Although somewhat lengthy, I quote as follows: Street J. who delivered the judgment of a Divisional Court composed of himself and Falconbridge J., said at p. 549:

"... a rule has been enunciated in England which has been expressly approved by the Court of Appeal there in *Steward v. North Metropolitan Tramways Co.*, 16 Q.B.D. 556, which I think we are bound to follow, and which has the merit of placing the obligation to allow amendments upon a more solid basis than that afforded by a balancing of the respective merits of the parties in each case in which an application to amend is made.

"The rule to which I refer is thus stated by Lord Esher, M.R.: 'The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made;' and Lord Justice Lindley says, at p. 559: 'I entirely agree with the terms in which the rule as to amendments has been laid down in the cases cited by the Master of the Rolls. I think an amendment

ought always to be allowed, except when the other party cannot be placed in the same position, but an injury would be occasioned to him by the amendment which could not be compensated by costs.'

"I have not failed to observe the difference between the English Rule (309 of the year 1883), under which the cases to which I have referred were decided, and our own Rule 444. The former requires that 'all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.' Our Rule is that 'all such amendments may be made as may be *necessary for the advancement of justice*, determining the real question or issue raised by or depending on the proceedings, and *best calculated to secure the giving of judgment according to the very right and justice of the case.*' A reference, however, to the cases decided upon the English rule will shew that they have practically construed it as if it contained the language used in ours. Notwithstanding its imperative language, they have in many cases refused leave where they deemed the amendments not conducive to the advancement of justice, or of a technical character and therefore not best calculated to secure the giving of judgment according to the very right and justice of the case."

Admissions made in pleadings or otherwise for the purpose of trial are judicial admissions. The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, *i.e.*, the prohibition of any further dispute of the effect by him and by any use of evidence to dispute or contradict it.

An admission may, in certain circumstances and upon proper terms, be withdrawn on leave of the Court. Nevertheless it is well established that facts admitted cannot be withdrawn unless it is proved by satisfactory evidence that the fact so admitted was not true. Decisions both in our Courts and in other Provinces sustain this statement and it is cited by the respondent's counsel in his memorandum of fact and law in the words found in 25 Halsbury's Laws of England, 2nd ed. 1937, pp. 256 *et seq.*, particularly in s. 425, which reads in part as follows:

"If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the

other side. There is no injustice if the other side can be compensated by an order as to costs; but if, owing to the way in which the pleading has been framed, the other party has been put into such a position that an injury would be done to him by an amendment, the Court will not give leave."

In *Delap v. Canadian Pacific R.W. Co.* (1915), 8 O.W.N. 293, Middleton J. in dealing with a motion to amend by withdrawing an admission said: "This amendment was sought as of right, without any evidence shewing why that which was once stated and admitted should now be withdrawn. It was not to be supposed that such a statement, deliberately made, could be without foundation; and the defendants were justified in asking that it should remain of record, so that they might have whatever advantage it might give them."

In *Wright v. Way* (1880), 8 P.R. 326, Blake V.C. said: "... I think the Court should not allow a defendant to vary his answer unless a mistake or misapprehension is clearly made out, and some reason assigned for this existing."

In *Gesman v. The City of Regina et al.* (1907), 1 Sask. L.R. 39, 7 W.L.R. 307, a single judge (Newlands J.) stated the rule thus: "Before an admission made on the pleadings can be withdrawn, there should be evidence produced that it was inadvertently made, and that the admission is not correct."

In *Wampler v. British Empire Underwriters Agency* (1920), 48 O.L.R. 428, 57 D.L.R. 88, Masten J.A. at pp. 433-4, delivering the judgment of the Court of Appeal, concurred in by Mulock C.J.O. and Magee and Riddell JJ.A., said: "Our Rule 183 is not quite the same as the English Rule; but, even under our Rule it has been held by my brother Riddell, in a judgment concurred in by my brother Sutherland—*Witherspoon v. Township of East Williams* (1918), 44 O.L.R. 584, at p. 602, 47 D.L.R. 370, at p. 387—that 'Rule 183 does not compel us to amend *proprio motu*: amendments under that Rule are "to secure the advancement of justice," not to enable a litigant to obtain a dishonest advantage.' "

After considering these authorities and those others to which counsel referred, and in the light of the circumstances in this case, I am of the opinion that the appeal must be allowed. Counsel for the respondent made some effort to argue that the admission in the original statement of defence had been a slip of

a solicitor in the rush of preparing the pleading, but it is quite clear that subsequent thereto a copy of the same letter was set out in the affidavit on production filed on behalf of the defendant. Moreover, counsel for the respondent produced no evidence or argument whatsoever that the admission contained in the original pleading was not, in fact, correct. I do not consider that this is a case where the amended pleadings should be allowed on the grounds that the appellant can be compensated in costs. The appeal is therefore allowed and the order of the Senior Master is restored. Costs both here and below to the appellant.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.

Solicitor for the defendant, respondent: W. G. Angus, Toronto.

[COURT OF APPEAL.]

McCreary v. Therrien Construction Co. Limited and Therrien.

Bailment—Duties and Liabilities of Bailee—Destruction of Property by Fire—Onus on Bailee to Disprove Negligence—Renting of “trailer” as Living Accommodation.

The defendant rented a “cabin trailer” from the plaintiff, for use as living quarters by himself and others. While the “cabin trailer” was in the defendant’s possession it was destroyed by fire, and the plaintiff sued to recover its value.

Held, in these circumstances the onus was on the defendant to show that the loss of the property had not resulted from any negligence or improper conduct on his part and, since he had not satisfied the jury of this, judgment should go against him. *Pratt v. Waddington* (1911), 23 O.L.R. 178; *Phipps v. The New Claridge’s Hotel (Limited)* (1905), 22 T.L.R. 49; *The “Ruapehu”* (1925), 21 Lloyd, L.R. 310, applied.

AN APPEAL by the defendant Therrien, and a cross-appeal by the plaintiff, from the judgment of Anderson Co. Ct. J., of the County Court of the County of Hastings, entered on the findings of a jury.

19th September 1951. The appeal was heard by LAIDLAW, HOGG and MACKAY JJ.A.

K. G. Morden, K.C. (R. A. Pringle, K.C. with him), for the defendant Therrien, appellant: The trial judge placed upon us the onus of satisfying the jury that the plaintiff’s damages did not arise through negligence or improper conduct on our part.

In our submission this was incorrect in the circumstances of this case.

Bailments may be divided into three kinds: (1) a wholly gratuitous bailment; (2) a bailment for reward, *i.e.*, for the profit of the bailee; and (3) one for the benefit of both parties, as in this case, which was the hiring of a chattel. We submit that while there may be an onus on the bailee in the first case, and a very heavy onus on him in the second case, the onus in the third case is on the bailor, before he can recover, to show that the bailee was negligent: 1 Halsbury, 2nd ed. 1931, p. 759. In other words, a hirer is bound only to exercise reasonable care: *Cooper v. Barton* (1810), 3 Camp. 5n, 170 E.R. 1287; *Sanderson v. Collins*, [1904] 1 K.B. 628 at 633; *Reynolds v. Roxburgh et al.* (1886), 10 O.R. 649 at 655; *McKenzie v. Ocean Accident and Guarantee Corporation, Limited* (1921), 20 O.W.N. 406; *Norwich Union Fire Insurance Co. v. Oxford Garage* (1921), 21 O.W.N. 218, affirmed 21 O.W.N. 397.

The plaintiff relies on *Pratt v. Waddington* (1911), 23 O.L.R. 178, but that was a case of gratuitous bailment, with the added feature that the bailee lent to a third person. *Aselstine v. McAnally*, [1950] O.W.N. 229, is inconsistent within itself.

I concede that there is a limited onus on us, but it is only a secondary onus, or what Duff C.J.C. called the burden of adducing evidence. If, when the plaintiff demanded the return of his trailer, we had simply not produced it, and had given no explanation, there would have been an onus on us to account for it. But we satisfied that onus by showing that the trailer had been destroyed by fire, and the onus then shifted to the plaintiff to prove that we were responsible for that fire. The burden on the plaintiff to prove negligence is the primary onus and remains on him throughout the case. We refer to 4 C.E.D. (Ont.), 1st ed. 1928, pp. 752-3; *Smith v. Nevins et al.*, [1925] S.C.R. 619 at 638, [1924] 2 D.L.R. 865; *The Ontario Equitable Life and Accident Insurance Company v. Baker*, [1926] S.C.R. 297 at 308, [1926] 2 D.L.R. 289.

In addition it should be noted that the plaintiff by his pleadings assumed the burden of proof, and adduced evidence at the trial to that end. [LAIDLAW J.A.: Is there not a principle that where a bailee is the only one who knows of the destruction of the goods he must come forward with an explanation?] Yes,

but where a full explanation is given, as here, then as a matter of law there must be some evidence of negligence before the bailor recovers.

There was no evidence to support a finding of negligence on our part. We used the trailer in the same way that the plaintiff had used it—he too had used a stove in it in the winter.

Malcolm Robb, for the plaintiff, respondent: It is not the law that there is a distinction in respect of onus between different types of bailment. The onus rests upon any bailee, in whose sole custody goods have been, to give a satisfactory explanation of his failure to return them in the condition in which he received them: 1 C.E.D. (Ont.), 2nd ed. 1949, p. 414; *Pratt v. Waddington* (1921), 23 O.L.R. 178.

We are entitled to judgment against the defendant company as well as the individual defendant, and ask either that judgment be so entered or that we be given a new trial against that defendant.

K. G. Morden, K.C., in reply and as to the cross-appeal.

R. A. Pringle, K.C., for the defendant company, respondent in the cross-appeal.

Cur. adv. vult.

11th October 1951. LAIDLAW J.A.:—This is an appeal by the defendant Ross Therrien from a judgment pronounced by His Honour Judge Anderson in the County Court of the County of Hastings, after a second trial of the action with a jury, the second trial having been ordered by this Court, differently constituted, on the 17th January 1950. Upon findings made by the jury, the Court ordered that the plaintiff recover from the defendant Ross Therrien the sum of \$500 and that the action be dismissed as against the defendant Therrien Construction Co. Limited. The appellant asks that the judgment against him be reversed and that the action as against him be dismissed or, in the alternative, for an order directing that there be a new trial. After notice of appeal was given by the appellant, the plaintiff also gave notice of appeal and in it he asked for an order that the judgment of the Court below be amended and that judgment be entered in favour of the plaintiff against the defendant Therrien Construction Co. Limited or for a new trial against that defendant and/or the defendant Ross Therrien.

The plaintiff was the owner of a "cabin trailer" and contents, suitable for housing accommodation. It is alleged in the statement of claim that the defendant company leased it from the plaintiff or, in the alternative, that the defendant Ross Therrien leased it for his personal use, and that on the 12th February 1946 the cabin trailer and contents were completely destroyed by fire. The plaintiff alleged further that the fire was caused by negligence of the defendant company, its servants or agents, or, in the alternative, by negligence of the defendant Ross Therrien. The defendant Ross Therrien in his statement of defence sets forth that the "building" was rented by him and three other named persons for living quarters. He expressly denies that it was destroyed through his negligence and pleads that "the said destruction was entirely accidental". The defendant Therrien Construction Co. Limited pleaded, *inter alia*, that it was not the tenant of the plaintiff at the time the "building" was destroyed. The plaintiff joined issue with each defendant.

The questions submitted to the jury and their answers thereto are as follows:

"1. Was the trailer camp in the possession and control of the defendant Ross Therrien on February 12th, 1946, the date of the fire, under a hiring arrangement with the plaintiff Harry McCreary? Answer 'yes' or 'no': Yes.

"2. If the answer to question number 1 is 'no' then answer the following question: Was the trailer in the possession and control on February 12th, 1946, the date of the fire, of the defendant Therrien Construction Company Limited under a hiring arrangement with the plaintiff Harry McCreary? Answer 'yes' or 'no': No answer.

"3. If the answer to question 1 is 'yes' then answer the following question: Has the defendant Ross Therrien satisfied you that the plaintiff's damage did not arise through negligence or improper conduct of the defendant Ross Therrien? Answer 'yes' or 'no': No.

"4. If the answer to question 1 is 'no' and the answer to question 2 is 'yes' then answer the following question: Have the defendants, the Therrien Construction Company Limited, satisfied you that the plaintiff's damages did not arise through the negligence or improper conduct of the defendant Therrien Construction Company Limited? Answer 'yes' or 'no': No answer.

"5. In any event, at what amount do you assess the total damages sustained by the plaintiff? A. \$500.00."

When the appeal came on for hearing counsel for the appellant Ross Therrien stated to the Court that the appellant accepts liability if there is no error in the proceedings in the court below. He rested the appeal on the ground that the learned trial judge erroneously placed on the appellant the burden of proof that there was no breach of duty on his part which caused the destruction of the trailer and contents. He maintained that the onus of proving that negligence of the appellant was the cause of the loss suffered by the respondent rested on the respondent, and he relied in support of his argument on the following cases: *Cooper v. Barton* (1810), 3 Camp. 5n, 170 E.R. 1287; *Reynolds v. Roxburgh et al.* (1886), 10 O.R. 649; *Sanderson v. Collins*, [1904] 1 K.B. 628; *McKenzie v. Ocean Accident and Guarantee Corporation, Limited* (1921), 20 O.W.N. 406; *Norwich Union Fire Insurance Co. v. Oxford Garage* (1921), 21 O.W.N. 218, affirmed 21 O.W.N. 397; *Aselstine v. McAnally*, [1950] O.W.N. 229.

I have studied the judgments in all of those cases but cannot accept any of them as support for the argument on behalf of the appellant. The question now under consideration does not appear to have been raised or decided in any of the cases cited by counsel for the appellant. I mention only one of them in particular. In *Reynolds v. Roxburgh et al.* the question for decision, as stated by Wilson C.J., was "whether the lessor or hirer of the steam engine, the boiler of which burst, or the lessee of it is answerable for the injury done to it". The decision rested on the existence of an implied warranty that the engine and boiler were reasonably fit for the purpose for which they were let. I observe, however, that Armour J. stated:

"The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that such negligence caused the explosion and destruction of the boiler and engine."

I cannot accept that statement of the law as applicable to the facts of the present case. I may say, also, that proof "beyond reasonable doubt", as stated by the learned justice in the passage quoted and elsewhere in his judgment, is not required in any event in such a case as the one presently in appeal.

The question in controversy has been decided in this Province on an appeal heard by Mulock C.J. Ex. D. and Teetzel and Middleton JJ. in *Pratt v. Waddington* (1911), 23 O.L.R. 178. The facts in that case, as they appear from the headnote in the report, are:

"The plaintiff lent a horse to the defendant, who handed it over to another person, who used it for heavy work. The horse died three weeks after it was lent. The cause of death was not shewn. The man who worked the horse was not called as a witness, and no evidence was given to shew how the horse was housed, fed, or cared for."

In an action for damages for the non-return of the horse, it was held that the onus was upon the defendant to excuse the default. The decision rests on the authoritative statement found in the headnote to *Phipps v. The New Claridge's Hotel (Limited)* (1905), 22 T.L.R. 49, that "Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part." Middleton J. reviewed the cases with much care, and considered *Cooper v. Barton*, *supra*, now relied upon by counsel for the appellant.

The principle was applied in *Polson Iron Works Limited v. Laurie*; *Laurie v. Polson Iron Works Limited* (1911), 3 O.W.N. 213, 20 O.W.R. 314. I refer also to *Carlisle v. Grand Trunk R. W. Co.* (1912), 25 O.L.R. 372, 1 D.L.R. 130; *Macdonell v. Woods* (1914), 32 O.L.R. 283, 20 D.L.R. 366; *Pye v. McClure* (1915), 21 B.C.R. 114, 8 W.W.R. 538, 22 D.L.R. 543; *Murphy v. Hart* (1919), 53 N.S.R. 79, 46 D.L.R. 36; *McCauley v. Huber*, 13 Sask. L.R. 401, [1920] 3 W.W.R. 123, 54 D.L.R. 150; *Barron v. Toronto Terminal Warehouse Limited* (1922), 22 O.W.N. 127, and *George v. Canadian Northern Railway Co.* (1922), 51 O.L.R. 608, 69 D.L.R. 654, affirmed 53 O.L.R. 94.

Finally, the question was the subject of consideration and discussion in *The "Ruapehu"* (1925), 21 Lloyd, L.R. 310. While a vessel was in the appellants' dry-dock undergoing repairs, a fire did extensive damage to it. At p. 310 Bankes L.J. made plain his view that if the entire control or the complete possession of the vessel was handed over to the appellants, the duty would be upon them to establish that the fire was not due to any negligence on the part of their servants. At p. 314 Atkin L.J. ex-

pressed the view that in the circumstances of the case the defendants were under the obligation of satisfying the Court that the injury to the ship was not caused by an absence of reasonable care and skill on their part. He stated, at p. 315, that an authoritative statement of the law was to be found in the case of *Dollar v. Greenfield*, "The Times", 19th May, 1905, p. 3 (followed in *Pratt v. Waddington*, *supra*).

Dollar v. Greenfield was a case of a bailment of a horse for hire. It broke away from the hirer's servants and ran into a thoroughfare, where it was injured. A jury found for the plaintiff. The Court of Appeal reversed a judgment in favour of the plaintiff and decided that there was no evidence of negligence on the part of the defendant, but the House of Lords reversed the decision of the Court of Appeal and restored the judgment for the plaintiff. Lord Halsbury L.C. stated that the contract was one of bailment and (I quote from the report of "*The Ruapehu*", *supra* at p. 315): "the defendant was bound to restore the subject of the bailment in the same condition as that in which he received it; and it was for the defendant to explain or offer valid excuse for not having done so. It was for him to prove that reasonable care had been exercised."

Lord Justice Atkin explains the grounds upon which the principle is founded, and I quote his language as follows: "The bailee knows all about it; he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged."

I reach the conclusion, on the authorities to which I have referred, that the learned trial judge in the present case properly placed the burden of proof on the defendants. The jury has found that the trailer was in the possession and control of the defendant Ross Therrien at the time of the fire, and that he did not satisfy them that the damages did not arise through his negligence or improper conduct. Those findings are good and sufficient in law to support a judgment for the plaintiff, as against the defendant Ross Therrien, and the appeal by him must therefore be dismissed. The appeal of the plaintiff should also be dismissed. His claim was made against one defendant or, in the alternative, against the other, and having obtained judgment

against one of them in accordance with his claim, he cannot now seek judgment against the other one. I would direct that the appellant pay the respondent the costs of the appeal by the defendant Ross Therrien to this Court, and that there should be no costs of the appeal by the plaintiff.

HOGG J.A.:—I agree with the judgment of my brother Laidlaw.

In my view the evidence leaves the issue of negligence in doubt, in other words it is not possible to come to a clear conclusion one way or the other and if the onus rested on the plaintiff, in my opinion, he would fail. But because the rule of law casts the onus on the defendant this is the determining factor in holding the defendant to be liable: *Newell et al. v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36, [1939] 1 D.L.R. 51.

MACKAY J.A. agrees with LAIDLAW J.A.

*Appeal dismissed with costs; cross-appeal
dismissed without costs.*

*Solicitors for the plaintiff, respondent and cross-appellant:
Robb, Ross & Cass, Belleville.*

*Solicitors for the defendant Therrien, appellant: Pringle &
Graham, Belleville.*

*Solicitors for the defendant company: O'Flynn & O'Flynn,
Belleville.*

[COURT OF APPEAL.]

Jeffs and Jeffs v. Matheson; Matheson and Matheson v. Jeffs et al.

Appeals—Reversal of Findings of Fact—Trial Judge Sitting without Jury—Finding Based on Unjustified Inference, not Supported by Evidence.

When, as not infrequently happens, the findings of fact of a trial judge (sitting without a jury) are based, not on an unfavourable view of the veracity of a witness or witnesses, but rather on an inference drawn by him from other conclusions reached in his mind, it is proper for an appellate Court to examine the grounds of those conclusions and the inferences drawn from them and if it is convinced that the inferences were erroneous and that evidence was rejected because of that error it is justified in taking a view different from that of the trial judge. *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243, quoted and applied; *Watt or Thomas v. Thomas*, [1947] A.C. 484, referred to.

AN APPEAL by William Matheson from the judgment of Schroeder J., after the trial of two actions together without a jury at Goderich.

10th November 1950. The appeal was heard by ROBERTSON C.J.O. and ROACH and MACKAY JJ.A.

E. L. Haines, K.C., for the appellant: There is a conflict in the findings of the learned trial judge. Having found that the respondents were in error as to the visibility, and that visibility was only 50 feet, he had no basis for his finding that the appellants' car was veering to the east of the centre-line of the road, since the only evidence on which that finding could be based was the respondents' statement that they saw the car angling towards them for a distance of 100 to 150 feet. This error of the respondents as to visibility is a serious one, affecting their credibility, and must be borne in mind in considering all parts of their evidence.

In finding that there was no debris, and that there were no skid-marks or tire-marks, or other things useful as indicating where the collision took place, the trial judge overlooked the undisputed evidence of two witnesses that broken parts of the Matheson car were beneath it on the west side of the road. There was also uncontradicted evidence that the anti-freeze from the car's radiator had run out on to the highway at that point. In addition there was Mrs. Matheson's evidence that the tire-marks of their car were on the west side of the highway for at least 30 feet behind it. This evidence should not have been rejected, as it was, by the trial judge, because although Mrs. Matheson had been severely injured she yet had sufficient

possession of her faculties to get out of the car and walk back to stop oncoming traffic. If she had sufficient presence of mind to do that she may well have been in a condition to observe the tire-marks, particularly since she walked back in them and the headlights of the approaching car were shining on them. As to her evidence that there was snow on the road, but that the highway was blown clear in spots, it is well known that, particularly with a cross-wind, snow will blow right across a highway and gather at the edges. Parts may be clear, but there may be a light deposit of snow moving along as the snow whirls, and tire-marks would be clearly visible.

In refusing to accept the evidence of the witness Lostell because he made no statement about the car-tracks until a week before the trial the trial judge overlooked the fact that until then no one had asked him about them.

The trial judge failed to give due regard to the position of the cars after the accident. Speculation as to the reason for their position was based on the fact that the respondents' car was heavier, and probably travelling faster than the appellants' car. It is true that inferences may be drawn, but there must be some basis for them. There is no evidence here to justify an inference that the Matheson car was not on its own side of the road at the time of impact. The respondents admitted that they did not know where their car was with reference to the centre-line at the time of impact.

The trial judge was wrong in permitting the cross-examination of Mrs. Matheson upon evidence given by her at the coroner's inquest. He held that because she was a plaintiff rather than a defendant s. 25(4) of The Coroners Act, 1948 (Ont.), c. 17, did not apply. This was too narrow a view; it is not reasonable to hold that the subsection protects one who is sued, but not one who sues: see The Interpretation Act, R.S.O. 1937, c. 1, s. 10; 10 C.E.D. (Ont.), 1st ed. 1932, pp. 219, 221.

G. L. Mitchell, K.C., for the respondents: The trial judge was right in rejecting Mrs. Matheson's evidence as to the tire-marks, and in the reasons for which he did so. As to the evidence of Lostell, the trial judge rejected it after seeing, hearing and questioning him, and his decision in that respect should not be disturbed.

The general rule as to the review on appeal of findings of a trial judge who has seen and heard the witnesses is stated in

Watt or Thomas v. Thomas, [1947] A.C. 484, [1947] 1 All E.R. 582.

As to the evidence at the inquest, there is no protection under s. 25(4) of The Coroners Act unless civil or criminal proceedings are taken against the person who has given evidence at the inquest. [MACKAY J.A.: Does that apply even if such proceedings are in contemplation?] Yes. The appellant's view of the section, if adopted, would mean that any person who gave evidence at an inquest would be protected except in a prosecution for perjury, and that cannot be what the Legislature intended. I refer to Maxwell on The Interpretation of Statutes, 9th ed. 1946, p. 3.

E. L. Haines, K.C., in reply.

Cur. adv. vult.

1st May 1951. The judgment of the Court was delivered by

MACKAY J.A.:—This is an appeal by the plaintiff William Matheson from the judgment of Mr. Justice Schroeder, delivered on the 27th April 1950, whereby he found the plaintiffs and the defendants equally responsible for a motor vehicle accident.

These actions were tried together at the non-jury sittings of the Court at Goderich. For convenience, I shall refer, in these reasons for judgment, to William Matheson and Barbara Ross Matheson as plaintiffs and to Donald Jeffs and Bernice Jeffs as defendants.

The essential facts are within a small compass and uncomplicated. On the evening of 10th February 1949, at or near the hour of 7.20, the plaintiff William Matheson, accompanied by his wife, Barbara Ross Matheson, was driving a Dodge motor car on Ontario provincial highway no. 4, when it came into collision with a Buick car being driven by the defendant Donald Jeffs and owned by one Joseph Henry Evans, who at the time of the accident was riding on the right side of the front seat of his car. Mr. Evans is now deceased. The learned trial judge found the following facts:

The highway at the point of collision runs north and south; at the time of the collision, the car of the plaintiff was being driven southerly and that of the defendant northerly; the highway is paved to a width of 20 feet; there are grass shoulders 6 feet in width, respectively, on the east and west side of the said pavement; it had been snowing heavily for an hour and a half to

two hours prior to the accident and at the time of the collision the road surface was completely covered with snow; earlier it had been thawing but at the time of the accident it was freezing, making the road "somewhat slippery"; at or near the site of the accident there was a complete absence of tire-marks or skid-marks or of broken glass or debris. The learned trial judge finds further that all parties are motivated by a sincere desire to give a truthful account of the occurrence, subject to certain limitations which he finds himself compelled to impose upon their testimony. The learned trial judge accepts the evidence of the plaintiff Barbara Matheson that when the two cars were some distance apart (300 feet or more) there was a heavy gust of wind from the west, bringing with it a blinding curtain of snow which completely obliterated a view of anything ahead of them, thereby reducing visibility to zero. The learned trial judge does not accept the evidence of the defendants that this gust of wind and fall of snow occurred some time earlier when they (the defendants) were passing through Hensall, one mile to the south of the scene of the accident, and that at the time of the accident there was only a light snowfall, which had no effect on visibility. The learned trial judge says: "The plaintiffs' evidence on this point has convinced me that the defendants are mistaken." He also says: "I find as a fact that both drivers traversed a distance of at least 300 feet which separated them as they approached each other, through a blinding snowstorm which prevented them from seeing anything in their respective paths until they were within 50 feet of each other." The learned trial judge further finds that when both vehicles came to rest the plaintiffs' car was wholly on the west side of the highway, the easterly limit of the plaintiffs' car being westerly from the centre of the highway at least one or two feet and facing practically due south, whereas the defendants' car was facing in a north-east direction with the left front approximately two feet over the centre-line of the highway and west thereof. The defendants testified to the impression that the plaintiffs' car was veering toward their motor car travelling in a south-easterly direction.

The plaintiff William Matheson sustained a severe concussion, which blotted out his memory of events immediately preceding the crash. The plaintiff Barbara Matheson says in evidence that the defendants' car was bearing down on their car

in a north-west direction and that it (the defendants' car) came over on the westerly half of the highway and into collision with the plaintiffs' car. The plaintiff Barbara Matheson further says that on the happening of the accident she immediately realized that southbound traffic should be flagged and that she walked northerly for that purpose, and that while walking northerly she observed, for 30 feet or more, wheel-marks of their (the plaintiffs') car running parallel to the west edge of the highway, wholly on the westerly side, and that those marks led directly to the rear of their (the plaintiffs') car. [His Lordship here quoted at some length from the evidence of Mrs. Matheson.]

The evidence of the defendant Donald W. Jeffs makes it abundantly clear that he, Jeffs, was unable to determine with any substantial degree of accuracy the position of his car on the highway at the moment of collision. [His Lordship here quoted from the evidence of this defendant.]

The learned trial judge in his reasons for judgment says:

"Much reliance is placed by the plaintiffs on the evidence of Mrs. Matheson to the effect that after the accident, whilst walking towards the approaching motor car of the late Dr. Goddard, she observed the wheel-marks of their car running parallel to the edges of the highway directly to the rear wheels of the motor car. Having regard to the fact that she sustained a fractured skull in the accident, although she does impress me as a person who would not be easily upset, I am satisfied that she was in such a state of confusion at the time that this portion of her evidence must be rejected. Nor do I accept the evidence upon this point of the witness Lostell, who admittedly spoke of these tracks for the first time on 13th April last, when he was served with a *subpoena*. I am of the opinion that this witness is susceptible to suggestion and that he was so on this occasion. Furthermore, contrary to the great preponderance of testimony, Mrs. Matheson mistakenly suggested that only the westerly four feet of the pavement was covered with snow, the centre portion being bare. If, as she stated, the right wheels of the Matheson car were within two feet of the westerly edge of the pavement, how, one may well ask, could she have seen two tracks made in the snow by the plaintiffs' car?"

I am not unaware of the long and distinguished array of authorities setting forth the law respecting a review of the find-

ings of fact of a trial judge by the Court of Appeal, such as *Watt or Thomas v. Thomas*, [1947] A.C. 484, [1947] 1 All E.R. 582, and cases therein cited, and *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243, and cases therein cited. In the latter case Viscount Sankey L.C. at p. 249 says:

"There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see *Clarke v. Edinburgh Tramways Co.*, [1919] S.C. (H.L.) 35 at 36, per Lord Shaw where he says: 'When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own

mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.' ”

In the *Powell* case, at p. 255, Lord Atkin, in crisp and unequivocal language, says: “I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong: it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the judge who saw and believed.”

And Lord Wright in the same case at p. 267 says: “In truth, it is not desirable, in my opinion, to do more than state . . . principles which will guide the appellate Court in the majority of such cases. The problem in truth only arises in cases where the judge has found crucial facts on his impression of the witnesses; many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says [in *Owners of S.S. Hontestroom v. Owners of S.S. Sagaporak* [1927] A.C. 37]: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse.”

It not infrequently happens, as in the instant case, that the findings of a trial judge are due to inferences from other conclusions reached in his mind rather than to an unfavourable view of the veracity of the witness or witnesses. In such cases

it is legitimate for an appellate Court to examine the grounds of those conclusions and the inferences drawn from them, and if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of evidence was due to such error, it will be justified in taking a view different from that of the trial judge. Due regard must be had by an appeal Court to the nature and circumstances of each individual case. Clearly what I have said is applicable only to appeals from a judge sitting without a jury. The verdict of a jury must stand if there is evidence to support it and it is one which may be reached by reasonable men properly directed.

The finding of the learned trial judge respecting the evidence is not based on a consideration of credibility but rather on an inference drawn from the fact that the plaintiff Barbara Matheson, having sustained a fracture of the skull, was confused. With respect, and in all humility, I cannot reconcile the unanswered and unanswerable evidence that immediately after the accident this plaintiff, in cool deliberation, realizing the danger to her husband, to herself and to oncoming south-bound traffic, had the presence of mind to proceed northerly to flag approaching traffic, with the finding of the learned trial judge that she was unable, because of her injury, to see, to comprehend and to remember the tracks of a car in the newly-fallen snow. Moreover, the finding that this plaintiff could not see two tracks in the snow in view of her evidence that part of the road was bare, is subject to the disability that in her evidence she repeatedly says that there was a sprinkling of snow, which evidence is supported by witnesses called by both the plaintiffs and the defendants. It is scarcely necessary to say that a skiff of snow on a black pavement makes the impression of the wheel-marks of a car driven thereon clearly and distinctly discernible.

It is clear from the reasons for judgment of the learned trial judge that his rejection of this evidence is due to an inference from a conclusion drawn from her injury rather than from an unfavourable view of her veracity.

One Joseph Lostell, who arrived at the scene of the accident shortly after its occurrence, testified that he too saw the tracks of a car as described by the plaintiff Barbara Matheson. The trial judge in his reasons for judgment says: "Nor do I accept the evidence upon this point (wheel tracks of Dodge car in snow)"

of the witness Lostell who admittedly spoke of these tracks for the first time on April 13th last when he was served with a *subpoena*. I am of the opinion that this witness is susceptible to suggestion and that he was so on this occasion." [His Lordship quoted from the evidence of Lostell.]

I am respectfully of opinion that the finding of the learned trial judge referable to the mental inability of the plaintiff Barbara Ross Matheson to apprehend the then existing condition is so speculative in its essence and character that it should not prevail, and with the utmost deference I am further of opinion that to reject in its entirety the evidence of Lostell, which in a most comprehensive way corroborates the evidence of Mrs. Matheson, simply because he "admittedly spoke of these tracks for the first time when he was served with a *subpoena*" is in the circumstances unfortunate and on the whole substantially without justification. But if I am wrong respecting the rejection of the evidence of Lostell I nevertheless conceive this to be one of those "rare" cases where, after a careful review of the evidence and of the reasons for judgment of the learned trial judge I find myself unhesitatingly drawn to the conclusion that he, the learned trial judge, was in error when he, for the reasons stated by him, rejected specific portions of the evidence of the plaintiff Barbara Ross Matheson.

The result is that in my opinion the learned trial judge should have found that at the time of the collision the plaintiffs' car was wholly on the westerly half of the highway and that the sole and only cause of the accident was the failure of the driver of the defendants' car to abide by the provisions of s. 39(7) of The Highway Traffic Act, R.S.O. 1937, c. 288, now R.S.O. 1950, c. 167, s. 41(8).

The appeal, therefore, should be allowed and there should be judgment against the defendants for the plaintiff William Matheson for \$6,676.56, with costs throughout. The action of the defendant Donald W. Jeffs and Bernice Jeffs against William Matheson should be dismissed with costs.

Appeal allowed with costs.

Solicitor for William Matheson, appellant: Frank Fingland, Clinton.

Solicitors for Donald Jeffs and Bernice Jeffs, respondents: Mitchell & Thompson, London.

[COURT OF APPEAL.]

Re Norman Estate.

Trusts and Trustees — Assignment by cestui que trust — Following Trust Moneys — Trustee Mixing Moneys with Own Funds in Bank Account — Lowest Balance.

If a trustee mixes trust funds with his own moneys in a banking account, then if there is ultimately a credit balance in that account the *cestui que trust* has, as against the trustee and his unsecured creditors, a charge on the account for the trust moneys, but the charge is limited to the amount of the lowest credit balance in the account in the intervening period. *James Roscoe (Bolton), Limited v. Winder*, [1915] 1 Ch. 62 at 69; 33 Halsbury, 2nd ed. 1939, s. 570, approved. Where a trustee has confused or mixed trust moneys with his own, the whole is to be treated as belonging to the trust, except so much as the trustee can distinguish as his own. *Brighouse v. Morton*, [1929] S.C.R. 512 at 519, applied.

The interest of a *cestui que trust* in a trust fund is a chose in action that can be assigned, and notice to the trustee of the assignment makes him a trustee for the assignee. *In re Freshfield's Trust* (1879), 11 Ch. D. 198, followed.

Mortgages — Effect of Advance by Mortgagee to Agent — Delay in Execution and Delivery of Mortgage.

Where a proposed mortgagee advances funds to his agent, to be paid over to the mortgagor upon execution and registration of the mortgage, the agent holds the funds as trustee for the mortgagee, and the mortgagor is not a *cestui que trust*. *Burdick v. Garrick* (1870), L.R. 5 Ch. 233, applied.

AN APPEAL by Leslie Samuel Williams and Claire Audrey Williams from an order of Barton Sur. Ct. J.

24th September 1951. The appeal was heard by LAIDLAW, HOGG and GIBSON JJ.A.

W. J. Smith, K.C., for the appellants: Our claim is that Norman held the \$1,500 as trustee for us, that the moneys are traceable to his trust account, and that we are entitled to them. [HOGG J.A.: The Surrogate Court Judge found that the money was never held in trust for your clients, and also that it could not be traced.] The evidence clearly makes it possible to trace the moneys.

In support of the submission that these funds were held in trust for us, I refer to 33 Halsbury, 2nd ed. 1939, s. 572, p. 330; *Bailey v. Jellet et al.* (1884), 9 O.A.R. 187 at 209; *In re Winding-up Act*; *In re Saskatchewan General Trusts Corporation*, [1938] 2 W.W.R. 375, [1938] 3 D.L.R. 544, 19 C.B.R. 269.

Payments made by the trustee, Norman, into the trust account from some other source can be used to supplement the trust fund provided there is shown an intention of the trustee so to supplement it. The arrangement between Norman and the

mortgagees for handing over the certified cheque for safe-keeping does not derogate from the existing trust established on our behalf. We never consented to the release of the \$1,000 from the trust, and throughout the mortgagees accepted payments from us on account of the mortgage, even while they held the cheque. I refer to *James Roscoe (Bolton), Limited v. Winder*, [1915] 1 Ch. 62 at 69, where a rule was laid down as to the lowest balance in the account. Our case, however, is clearly different.

There is no evidence that anyone else can trace trust money into the account, and even if they could do so we would be entitled under the rule in *Clayton's Case* (1816), 1 Mer. 572, 35 E.R. 781, "first in, first out". The only trust that can be established is ours, so the balance of the account is available to creditors generally. The fact that the mortgagees took the position that the original mortgage was satisfied supports our contention that the moneys were held by Norman in a fiduciary capacity.

Even if it is held that this money was not held by Norman as trustee for us, it was held by him as trustee for the mortgagees, and when we paid off that mortgage we were entitled to be subrogated in their position, and therefore were entitled to claim the trust moneys: 13 Halsbury, 2nd ed. 1934, pp. 123-4. We created an equitable mortgage, and it was accepted by the mortgagees: Falconbridge, *Law of Mortgages*, 3rd ed. 1942, pp. 70-1. If Norman held these moneys as trustee for the mortgagees, then when we paid off the \$1,500 mortgage after his death we did so in the mistaken belief that we were bound, and this entitles us to subrogation: 4 C.E.D. (Ont.), 1st ed. 1927, p. 288; *The Queen v. O'Bryan et al.* (1900), 7 Ex. C.R. 19; *Ferguson v. Zinn et al.*, [1933] O.R. 9, [1933] 1 D.L.R. 300; *Brown v. McLean* (1889), 18 O.R. 533.

J. S. H. Beck, for Hilda Stinson and Albert Stinson, execution creditors, respondents: An administrator should act on behalf of all the creditors; the appellant, acting as administrator, did not call in any other creditors, and told us our claim was ridiculous. He did everything possible to prefer his claim to those of all other creditors: *Thomson v. The Merchants Bank of Canada*, 58 S.C.R. 287, 45 D.L.R. 616, [1919] 1 W.W.R. 855.

No trust can be validly created without sufficient words, and it must be possible to identify the *cestui que trust*. Any person who paid money to Norman would find that it went into this one bank account. There is no evidence that Norman ever had any other account. The moneys were mixed, and the trust moneys cannot be identified: *In re Hallett's Estate; Knatchbull v. Hallett* (1880), 13 Ch. D. 696 at 723.

The appellants are in the same position as all the other creditors. No express trust or resulting trust has been established and therefore we are all in the same position. In considering the question of costs, it should be borne in mind that the position taken by the appellants alone has involved a small and insolvent estate in heavy costs.

V. M. Howard, for John Hilmer, a judgment creditor, respondent: Funds belonging to us also went into this same account. The account was kept as a "trust" account merely for the purpose of defrauding creditors; it was not in reality a trust account, but was Norman's general banking account. It is the only asset of the estate, and no payments are earmarked for the appellants.

W. J. Smith, K.C., in reply.

Cur. adv. vult.

22nd October 1951. The judgment of the Court was delivered by

HOGG J.A.:—This is an appeal from an order of His Honour Judge Barton, dated 9th November 1950, made in the Surrogate Court of the County of York, by which it was determined that the appellants, Leslie Samuel Williams and Claire Audrey Williams, should rank only as ordinary creditors of the estate of the late Edward D. Norman, deceased, in respect of their claim of \$1,400 against the aforesaid estate.

The Norman estate is insolvent, the assets amounting to \$3,042.06 and the claims against the estate amounting to some \$11,000. The respondents are creditors of the estate. The appellant Leslie Williams was appointed administrator of the estate. Hilda Stinson and Albert Stinson are execution creditors and John Hilmer is a judgment creditor.

The appellants claim that the said sum of \$1,400 was held by the deceased Norman in trust for them, and that as a consequence

they should be paid in preference to the ordinary creditors. The facts are somewhat involved and should, for an understanding of the issue, be set out in some detail.

Some short time prior to 12th September 1946 the appellants applied in writing to Norman, requesting him to obtain a loan for them of \$1,500 to be secured by a mortgage on Lot 191, on the south side of Melrose Street in the township of Etobicoke, in the county of York. The appellants, by agreement in writing dated the 1st January 1944, had agreed to purchase the said property from one Alice Piper for the sum of \$1,500, and required the money, which they had asked Norman to obtain for them, to pay the balance of the purchase-price. Norman secured the loan requested by the appellants, who wrote to him on the 12th September 1946, accepting it and instructing Norman to pay the said Alice Piper, from the mortgage-money, the balance due and owing under the agreement which has been mentioned. The funds for the loan had been obtained by Norman from J. A. Norris, Helen Norris and Sadie M. Thompson (hereinafter referred to as "the Norris'"), each of whom placed the sum of \$500 in Norman's hands for the aforesaid purpose. The money was deposited by Norman on the 13th September 1946, in a branch of the Canadian Bank of Commerce in Toronto, in an account called "Edward Norman Trust Account". A deed of conveyance of the property to the appellants could not be secured owing to the fact that it was necessary first to obtain a conveyance of the lot from the estate of one Andrew Duff, deceased, in whose estate the title to the property was, at the time, vested; but on the 14th September 1946 the appellants executed a mortgage as joint tenants of the property in question to the Norris' to secure the payment of \$1,500 upon the terms set out in the mortgage indenture. This mortgage was not registered. The mortgage-money was never paid to the appellants, nor was it ever repaid by Norman to the Norris'.

In July 1947 Norman was compelled, on account of ill-health, to go into a hospital to undergo an operation, and at this time he drew a cheque for \$1,000 upon the said trust account, payable to the mortgagees. Norman had this cheque certified by the bank, and he then placed it in the possession of the mortgagees at their

request. Subsequently, in March 1948, as appears from the evidence of the appellant Leslie Williams, Norman expected to have the title of the Melrose Street lot conveyed shortly to the appellants and he applied to the mortgagees for the return of the certified cheque, which had never been cashed, in order that he might have sufficient moneys available in his bank account to pay whatever balance was due under the agreement for sale of the property. In accordance with this request the mortgagees handed the cheque back to Norman.

After Norman's death, although the title to the property could be vested in the appellants upon payment of the balance of the purchase-price, the money for this purpose, which, as has been stated, was in Norman's bank account, could not be obtained, and another loan was obtained by the appellant from the Norris' for \$2,500, secured by a mortgage for that amount upon the property. The only money paid by the mortgagees in respect of this mortgage was the balance due on account of the purchase-price of the Melrose Street property, amounting to some \$1,300. The balance of the proceeds of this loan of \$2,500 was retained by the Norris' to recoup them for the \$1,500 originally placed in Norman's hands.

Leslie Williams gave evidence that his understanding of the matter was that if he did not get title to the property in question, the money Norman had obtained from the Norris' would be paid back to them. Both Leslie Williams and J. A. Norris testified that payments on account of the principal and interest upon the original sum of \$1,500 were made to Norman as agent for the Norris' by the appellants and remitted by Norman to his principals.

It is argued on behalf of the appellants that when the money was placed by the Norris' in the hands of Norman to be paid over to the appellants upon the security of a mortgage and when the mortgage for \$1,500 was executed by the appellants and delivered to Norman as agent for the mortgagees, Norman became a trustee of the money for the appellants. It is a somewhat curious circumstance that although the mortgage for \$1,500 contained the acknowledgment of the appellants that the mortgage money had been paid to them, a further term of the mortgage sets out

that the money secured by the mortgage need not be paid over to the mortgagors.

It is also argued by the appellants that if it be decided that Norman originally held the said sum of \$1,500 in trust for the Norris' the estate now holds this money in trust for the appellants, because of the assignment hereinafter mentioned. The appellants further contend that upon the principle of subrogation, apart from the said assignment, they now stand in the same position as was formerly occupied by the Norris' in so far as the trust is concerned.

Although Norman was the agent of the Norris' in connection with the transaction in question, he also occupied a fiduciary position in relation to them. I am of the opinion that the sum of \$1,500, placed in the hands of Norman for the purposes which have been mentioned, was held by Norman in trust for the Norris', and that a trust was not created in favour of the appellants by the payment of the money to Norman to be advanced to the appellants and by the execution by the appellants of the mortgage for \$1,500. An agent who is entrusted with funds for the purpose of being employed in a particular manner, which money should be kept distinct from the agent's own money, occupies a fiduciary position in relation to his principal. A leading case on this point is *Burdick v. Garrick* (1870), L.R. 5 Ch. 233.

After the execution of the mortgage for \$2,500 by the appellants to the Norris' and the retention by the latter of \$1,500 of the mortgage money, the Norris' considered they had no further claim against the appellant arising under the original mortgage for \$1,500. This fact is shown by the evidence of J. A. Norris and by the assignment in writing dated the 26th September 1950 from the Norris' to the appellants, of their claim against the Norman estate for the \$1,500. The assignment reads as follows:

"KNOW ALL MEN BY THESE PRESENTS that we, the undersigned, in consideration of the sum of One Dollar (\$1.00) paid to us by Leslie Samuel Williams and Claire Audrey Williams, the receipt whereof we hereby acknowledge, do hereby assign to the said Leslie Samuel Williams and Claire Audrey Williams absolutely all our right, title and interest to a claim against the Estate

of Edward D. Norman in respect to a sum of \$1,500 advanced to the late Edward D. Norman in trust to make a mortgage loan thereof to Leslie Samuel Williams and his wife, Claire Audrey Williams, together with all our right, title and interest in any interest accruing from the said advance.

"It is understood between the parties hereto that the assignees [*sic*] herein advanced the said sum of \$1,500.00 to the late Edward D. Norman in September of 1946, and subsequently Edward D. Norman delivered to the assignees [*sic*] herein a certified cheque for \$1,000.00, which the assignees [*sic*] held from July, 1947, to March, 1948, and then delivered same up to Edward D. Norman for cancellation. It is agreed that the assignment herein shall cover all right, title and interest, not only to the original advance of \$1,500.00, but the subsequent delivery of the certified cheque of \$1,000.00 to Edward D. Norman for cancellation.

"IN WITNESS WHEREOF the parties hereto have set their hands and seals this 26th day of September, A.D. 1950.

SIGNED, SEALED AND DELIVERED

in the presence of

Stanley A. Thompson

W. Davis

J. A. Norris

Sadie M. Thompson

Hilda Davis née Norris."

The evidence shows that this assignment had been discussed between J. A. Norris and Leslie Williams before it was executed.

Trusts and trust funds are choses in action which may be assigned, as, for example, the equitable interest in a fund: 4 Halsbury's Laws of England, 2nd ed. 1932, p. 423. It was held in *In re Freshfield's Trust* (1879), 11 Ch. D. 198, that notice to the trustee of a fund of an assignment by a *cestui que trust* of his interest in the fund converts the trustee into a trustee for the assignee.

The Norman estate had notice of the assignment because of the fact that Leslie Williams was and is the administrator of this estate. I am of the opinion that the assignment in question conveyed to the appellants all right and claim of the Norris' against the Norman estate as trustee of the fund in question.

Because of the fact that there was an actual assignment to the appellants of the claim of the Norris' against the estate of the

late Edward Norman, the question of subrogation need not be discussed.

It is argued on behalf of the respondents that the moneys advanced by the Norris', and held by Norman in trust, could not be traced through the trust account of the deceased. The "Edward Norman Trust Account" in the Canadian Bank of Commerce contains very many entries of debits and credits between 9th September 1946 and 29th June 1948, the period covered by the account which was put in evidence. The account appears to have been used by Norman as his general banking account, for it is hardly conceivable that all of the moneys dealt with in this account were trust funds. As was said by Blake V.C. in *Mulholland v. Merriam* (1873), 20 Gr. 152, and again by Boyd C. in *Elgin Loan and Savings Co. et al. v. National Trust Co.* (1903), 7 O.L.R. 1, there is no magic in the word "trust", and there is no evidence in this case to establish that any of the funds represented by this account were actually trust funds, except the \$1,500 in question in the present appeal. If a trustee mixes trust funds with moneys of his own in his banking account, then if there is ultimately a credit balance in that banking account to which the trust money can be traced, the *cestui que trust* has as against the trustee and his unsecured creditors a charge on the account for the trust moneys: 33 Halsbury, 2nd ed. 1939, s. 570, pp. 330-1.

In *James Roscoe (Bolton), Limited v. Winder*, [1915] 1 Ch. 62 at 69, Sargant J. held that a charge upon such an account as above mentioned is confined to "such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period". The rule has also been laid down that where a trustee has confused or mixed trust moneys with his own, the whole is to be treated as belonging to the trust, except so much as the trustee can distinguish as his own: Halsbury, *loc. cit.*; *Brighouse v. Morton*, [1929] S.C.R. 512 at 519, [1929] 3 D.L.R. 91.

In so far as the account in question is concerned, I think that the sum of \$1,000, represented by the certified cheque which was handed to the Norris' by Norman and afterwards obtained back by him and replaced in his account, is to be regarded as part of

the trust money which can be traced and identified, and that this transaction does not affect the interest of the *cestui que trust* in the fund: *In re Hallett's Estate; Knatchbull v. Hallett* (1880), 13 Ch. D. 696. The lowest balance of the moneys held in trust as aforesaid which can be traced is the sum of \$1,170.08, as is claimed by the appellants.

I am of the opinion that, for the reasons given, the order of the Court below should be set aside. The appellants are entitled to a charge on the account for the trust moneys to the amount of \$1,170.08. The appellants should have the costs of the appeal against the estate.

Appeal allowed with costs.

Solicitors for the claimants, appellants: Caudwell, Symmes and Smith, Toronto.

Solicitors for Hilda Stinson and Albert Stinson, respondents: Brown & Beck, Toronto.

Solicitor for John Hilmer, respondent: V. McLean Howard, Toronto.

[COURT OF APPEAL.]

Pluard v. Sheldon.

Motor Vehicles—Negligence—Charge to Jury—Overtaking and Passing Other Vehicle—Disabling of Car, necessitating Temporary Violation of Statute—The Highway Traffic Act, R.S.O. 1950, c. 167, ss. 41(10), (11), 43(1)-(4).

Subsections 10 and 11 of s. 41 of The Highway Traffic Act, as to overtaking and passing other vehicles, apply only where two vehicles are travelling in the same direction on a highway, and both are actually in operation. They do not apply to a case where one vehicle is standing wholly or partly on the travelled portion of the highway and cannot be operated by reason of engine failure, when it is overtaken by the driver of another vehicle.

Where there has been an apparent violation of subs. 1 or subs. 2 of s. 43 of The Highway Traffic Act, as to parking on the travelled portion of a highway outside of a municipality, but it is contended that by virtue of subs. 4 those subsections are inapplicable because the car was so disabled that it was impossible to avoid temporarily a violation of them, a question should be expressly submitted to the jury as to whether or not it was impossible to avoid such a violation, and they should be told that if they answer that question in the affirmative they must disregard the provisions of subss. 1 and 2, while if they answer it in the negative they must then proceed to consider whether there was a breach of those provisions, and whether or not that breach caused or contributed to the loss or damage out of which the action arises.

Appeals—Ordering New Trial on Grounds of Misdirection—Whether Substantial Wrong or Miscarriage Occasioned—The Judicature Act, R.S.O. 1950, c. 190, s. 28(1).

Where a charge to a jury contains misdirection and non-direction such that one party has not had his complaint in respect of the other party's conduct put before the jury in accordance with the law applicable to the circumstances of the case it cannot properly be said that there has been a fair trial, and if the trial has not been fair it follows that a substantial wrong or miscarriage has been thereby occasioned, and that the appeal cannot be dismissed under s. 28(1) of The Judicature Act.

AN APPEAL by the defendant from the judgment of Ferguson J., entered on the findings of a jury.

26th September 1951. The appeal was heard by LAIDLAW, HOGG and GIBSON JJ.A.

C. L. Dubin, K.C., for the defendant, appellant: The trial judge was wrong in telling the jury that s. 41(11) of The Highway Traffic Act, R.S.O. 1950, c. 167, imposed a statutory duty on the defendant. The subsection is wholly inapplicable to the circumstances of this case. It refers to a person "so overtaking another vehicle", which necessitates a reference to the previous subsection, and when subss. 10 and 11 are read together it is clear that they apply only to moving vehicles, and can have no application where one of the cars has stopped: I refer to *Marra's Bread Limited v. Eastern Canadian Greyhound Lines Limited*

et al., [1947] O.W.N. 847, [1948] 1 D.L.R. 267; *Hanmer v. Lucio*, [1951] O.W.N. 41.

Nowhere in the charge was the general onus placed on the plaintiff, as it should have been. The case was left to the jury in this way: Section 41(11) of the Act applies; the defendant struck the plaintiff's car, which necessarily involved a breach of s. 41(11); consequently the onus is on the defendant to "demonstrate" that he was not negligent. The word "demonstrate" is clearly wrong in any case; even if s. 41(11) did apply, we would not be under as heavy an onus as is implied by that word, which has been defined as "prove indisputably". Such an onus would create an impossible situation. [LAIDLAW J.A.: Does not the judge mean "prove", and would not the jury so understand it? After all, the jury was not looking at a dictionary.] In interpreting a charge to a jury the words must be construed according to their reasonable meaning: *Bigaouette v. The King*, [1927] S.C.R. 112, 47 C.C.C. 271, [1927] 1 D.L.R. 1147.

Nowhere in this charge has the trial judge so much as suggested that there is a general onus on the plaintiff, or said anything about proving a case by a balance of probabilities. A mere breach of The Highway Traffic Act does not shift the onus, but merely allows the plaintiff to rely on the breach as satisfying in part the onus that is on him: *Morris v. Luton Corporation*, [1946] K.B. 114, [1946] 1 All E.R. 1.

The trial judge erred in instructing the jury on s. 43(1) of the Act; he only read part of the subsection to them, and did not read the important qualification embodied in the first proviso, *viz.*, that unless there is a clear view for 800 feet there can be no leaving of a car on the travelled portion of a highway. [HOGG J.A.: That subsection does not contemplate a fog or a snowstorm.] If the visibility is poor the person who leaves a car standing on the highway takes an additional risk. Subsection 43(1) would have no meaning if it did not apply in conditions of poor visibility. Where there is not a visibility of 400 feet in each direction from the standing car, it must not be left there unless it is "impossible" to move it; the mere fact that it is not "practicable" to do so is not sufficient excuse. Reading subss. 1 and 4 of s. 41 together, we get the following possible situations: (1) if practicable, the car must be moved off the highway in any case; (2) if it is not "practicable", but not "impossible" it must be moved off unless there is clear vision for 800

feet; (3) if it is "impossible" to move it, subs. 4 makes the earlier provision inapplicable.

The trial judge must fully instruct the jury as to the relevant statutory provisions: *Janveau v. Teskey*, [1950] O.W.N. 201. [LAIDLAW J.A.: The crux of the matter is whether the defendant's wrong, or breach of the statute, was a contributing cause of the accident. It is for the jury to decide whether there was a causal connection. Can the trial judge's failure to read the proviso in s. 43(1) have resulted in any miscarriage of justice?] I submit it must have done so.

It is clear on all the authorities that a driver must be absolved of negligence if the other car is stationary and not clearly visible: *Hill-Venning v. Beszant*, [1950] 2 All E.R. 1151.

There was also misdirection and non-direction on the matter of damages, and the amount assessed by the jury was greater than the amount claimed by the plaintiff.

A. A. Macdonald, K.C., for the plaintiff, respondent: As to s. 43, there is no evidence as to how long our car had been standing on the highway before the accident, but it was presumably only a short time.

In any event, even if there was misdirection, the appeal should be dismissed under s. 28(1) of The Judicature Act, R.S.O. 1950, c. 190. In a criminal case the fact that there has been misdirection raises a presumption that a miscarriage of justice has resulted, and the Court may dismiss the appeal only if it is of the opinion that there has in fact been no such substantial wrong or miscarriage; in a civil case this is reversed, and the person who seeks a new trial on grounds of misdirection must establish affirmatively that the misdirection resulted in a miscarriage of justice or a substantial wrong. The jury found that the real cause of the accident was the unreasonable rate of speed at which the defendant drove and his failure to keep a proper look-out. [LAIDLAW J.A.: The appellant probably would not challenge that if the case had been put to the jury in the proper way. Here, however, the trial judge started with the alleged duty of the defendant under s. 41(1). Is it not fundamental to a proper trial that the duties and obligations of both parties, both by statute and at common law, shall be defined in the judge's charge?] My submission is that the result would probably have been the same if the charge had been correct in all respects.

As to damages, the disparity between the amount claimed and the amount awarded is very small. I refer to *Kong et al. v. Toronto Transportation Commission*, [1942] O.R. 433, [1942] 3 D.L.R. 312.

C. L. Dubin, K.C., in reply: It cannot possibly be said that no substantial wrong or miscarriage resulted where there has been a complete misstatement of the law by the trial judge, resulting in a wrong statement of blameworthiness as to the accident and of the onus on one party. Nothing is more important than a careful and correct instruction as to the law applicable.

The damages were assessed, presumably, on the basis that the plaintiff would never walk again, as stated by the trial judge, and this was not in accordance with the evidence. There was a clear misdirection as to the evidence here.

Cur. adv. vult.

30th October 1951. LAIDLAW J.A.:—This is an appeal by the defendant from a judgment of Mr. Justice Ferguson dated the 27th February 1951 in favour of the plaintiff for \$28,449.81 and costs of the action and dismissing a counterclaim of the defendant after a trial with a jury at the city of Peterborough, upon answers made by the jury to certain questions submitted to them.

The action was brought and the counterclaim was made to recover damages for personal injuries and damage to property resulting from a collision on 1st April 1950 between a motor vehicle owned by the defendant and being driven by him in an easterly direction on highway no. 7 about two or three miles east of the city of Peterborough and a motor vehicle owned by the plaintiff which was standing partly on the travelled portion of the highway. The collision occurred some time between 7 and 8 o'clock in the evening. It was a dark night, a heavy, wet snow was falling and the visibility was not good. While the plaintiff was going east on the highway, the engine of his car "stalled" by reason of some dirt in the carburetor. According to the evidence of the plaintiff, the left front wheel was not over 6 inches "if it was any" on the pavement and the left rear wheel "would be out on the pavement if it was on the pavement at all [*sic*]". He tried to push the car forward but could not do so and

he then stood in front of his car for the purpose of signalling to a motorist going west toward the city of Peterborough. One car passed him but did not stop and he then saw the lights of the appellant's car approaching from the west when it was 100 yards or more away. The appellant states that he did not see the respondent's car in front of him until he was within 30 feet of the vehicle. He says the snow was heavy and that as he was approaching the standing vehicle he was blinded by the lights of two cars coming toward him. His evidence is that when he did see the respondent's vehicle it was in the southerly lane of traffic and that he put on his brakes but could not avoid hitting it.

The answers of the jury to questions submitted to them are as follows:

"1. Was there any negligence on the part of Graydon Sheldon which caused or contributed to the cause of the accident? Answer: yes or no. A. Yes.

"2. If your answer to question No. 1 is yes, in what did such negligence consist? Answer fully naming every such act of negligence.

"A. (1) Due to the existing and prevailing conditions of motor driving Mr. Graydon Sheldon drove at a rate of speed faster than we the Jury consider safe.

"(2) The driver Mr. Graydon Sheldon was not paying strict attention to his driving or he would have observed the Pluard car in sufficient time to have avoided the collision as the evidence did show that the Pluard car was lighted as required by the H.T.A. at the time of the impact.

"(3) The evidence fails to reveal sufficient attempt on the part of Mr. Graydon Sheldon to avoid the collision.

"3. Was there any negligence on the part of Herbert James Pluard which caused or contributed to the cause of the accident? Answer yes or no. A. No.

"4. If your answer to question number 3 is yes, in what did such negligence consist? Answer fully naming every such act of negligence. (No answer.)

"5. If you find that there was negligence on the part of both Graydon Sheldon and Herbert James Pluard state in percentages the degree of fault of each.

Graydon Sheldon	-	-	-	-	100%
Herbert James Pluard	-	-	-	-	%
Total	-	-	-	-	100%

"6 At what amount do you assess the damages of

(a) Herbert James Pluard	-	-	\$28,449.81
(b) Irene Elva Quinlan	-	-	\$ 100.00
(c) David Quinlan	-	-	\$
(d) Earl G. Mitchell	-	-	\$ 55.00
(e) Graydon Sheldon	-	-	\$ 842.37"

The first ground of appeal is that the learned trial judge erred in directing the jury that subs. 11 of s. 41 of The Highway Traffic Act, R.S.O. 1950, c. 167, was applicable to the facts of the case. The learned trial judge said in the course of his charge:

"Let us look at the position Pluard is in first, and I want to refer you to some provisions in The Highway Traffic Act, which is our guide governing the operation of motor vehicles on the highway. There is a provision in The Highway Traffic Act which deals with one car's overtaking another car on the highway, and it is a rule you gentlemen are all familiar with:

" 'Any person so overtaking another vehicle or horseman shall turn out to the left so far as may be necessary to avoid a collision with the vehicle or horseman so overtaken, and the person so overtaken shall not be required to leave more than one-half of the road free . . . '

"So, you see, under the statute, it was Sheldon's duty, if you just take it that far and no more, to pass out to the left and pass around the Pluard car as it stood on the highway. I will come to, and deal with, Sheldon's answer to that . . .

"Let us see what the law is with respect to Sheldon's position. I have read to you the section of the statute which says that when one car is overtaking or passing another it will turn out to the left and pass to the left, and it is the obligation of the overtaken car to leave one-half of the road free . . .

"I have read to you the section dealing with passing to the left. Sheldon did not do that. That is clear, because he hit Pluard's car. If it had been broad daylight you will see that he would have passed over to the left and passed around. Not having obeyed the statute in that respect it is for him to demon-

strate to you that he omitted to pass around to the left through no negligence of his. In other words, the onus is on him to demonstrate to you that there was no negligence on his part in not having passed around to the left of the Pluard car."

Subsections 10 and 11 of s. 41 of The Highway Traffic Act have no application to the facts of the present case. Those subsections apply to a case where two vehicles are travelling in the same direction on a highway. They apply only when both vehicles are in operation and can be turned to the left or to the right as required by the provisions of the subsections. They do not apply to a case when one vehicle is standing wholly or partly upon the travelled portion of the highway and cannot be operated because of engine failure and is overtaken by a person in charge of another vehicle. My view is that the learned trial judge was plainly in error in the parts of his charge quoted above.

After stating to the jury, as quoted, that it was Sheldon's duty "to pass out to the left and pass around the Pluard car as it stood on the highway", the learned trial judge referred to the duty of the respondent. He read to them the first clause of subs. 1 of s. 43 of The Highway Traffic Act as follows:

"No person shall park or leave standing any vehicle whether attended or unattended, upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway."

He omitted and subsequently declined to read the following clause of that subsection, which I now quote as follows:

"provided, that in any event, no person shall park or leave standing any vehicle, whether attended or unattended, upon such a highway unless a clear view of such vehicle and of the highway for at least 400 feet beyond the vehicle may be obtained from a distance of at least 400 feet from the vehicle in each direction upon such highway."

The learned trial judge then proceeded in his charge and I quote:

"That is what the statute says. It goes on, and there is another provision. As you can see, the provision I have just read to you is a reasonable provision, ' . . . shall not apply to the driver or operator of a vehicle which is so disabled while on a highway that it is impossible to avoid temporarily a violation of such provisions'. That is what the statute says."

Counsel for the defendant submitted, in the course of his objections to the charge, that the learned trial judge ought to have instructed the jury that there was no evidence that the respondent's vehicle was so disabled that it was impossible to avoid temporarily a violation of the provisions of s. 43(1). The jury was recalled and I quote a part of the directions then given to them by the learned trial judge:

"I read to you a provision of the statute which said that, you will remember, no person shall leave a car parked on the travelled portion of the highway if it is practicable to move it off the highway. Then I read to you the provision that that section shall not apply to a driver or operator of a vehicle which is so disabled while on a highway that it is impossible to avoid temporary violation of such provision. I, perhaps, should not have read that to you at all, but it does deal with a disabled car, and this car was, in part at least, disabled. The engine had stopped running—it would not run—but, as counsel, I think, properly pointed out, there was nothing on the evidence which showed any impossibility in removing the car from the travelled portion of the way, even right after the engine had stopped. You have to consider that section along with the other sections, and the one with which you are chiefly concerned is the one which says that no person shall park or leave standing any vehicle, whether attended or unattended, upon the travelled portion of the highway if it is practicable to park or leave such vehicle off the travelled portion of the highway. Now, was this car so disabled as to make it impossible to move it off the highway?"

I do not discuss the evidence touching the question whether or not it was "impossible to avoid temporarily a violation" of the provisions of s. 43 of The Highway Traffic Act. It is sufficient to say that in my opinion it was open to the jury, in the exercise of their judicial discretion and function, to answer that question either in the negative or the affirmative. The learned trial judge was in error when he said that perhaps he should not have read to them, at all, the provisions contained in subs. 4 of s. 43 of the statute. He was likewise, wrong in his statement that "counsel . . . properly pointed out there was nothing on the evidence which showed any impossibility in removing the car from the travelled portion of the way". There was evidence to support a finding that it was impossible to avoid temporarily a violation of the statute. But if, in the opinion of the learned trial judge,

there was no such evidence, it was his duty to withdraw consideration of that question from the jury and direct them that provisions of s. 43 did not apply to the respondent in the particular circumstances of the case. Nevertheless and notwithstanding his decision that there was no evidence to support a finding that it was impossible to avoid temporarily a violation of s. 43, he left it to the jury to consider and answer that question.

With these contradictory and confusing directions, how did the jury proceed in their deliberations? Did they disregard the provisions of subs. 4 because of the view expressed by the learned trial judge that he should not have read that section at all? If so, they proceeded in error. Or did they disregard that part of the instruction in the law as given to them by the learned trial judge and proceed in accordance with the direction to answer the question, "Was this car so disabled as to make it impossible to move it off the highway?" If they did not, what answer did they make to the question? If they answered it in the affirmative, counsel for the appellant would, no doubt, have a right to contend, as he did at trial, that there was no evidence to support such an answer and that it would be contrary to the ruling of the learned trial judge that "there was nothing on the evidence which showed an impossibility in removing the car from the travelled portion of the way". If the jury answered the question in the negative, did they then proceed as they ought to and find whether there was a breach of the provisions contained in subs. 1? If they did so, they had instructions only in respect of part of these provisions.

In my opinion, they ought to have had all the provisions contained in that subsection explained to them and adequate directions should have been given as to the manner in which to apply them to the evidence. The appellant is now in a position where he does not know upon what finding or upon what basis the respondent has been freed by the jury from all fault for the consequences of the collision. He does not know whether the jury concluded that it was impossible or merely impracticable to move the vehicle off the travelled portion of the highway. He does not know whether the jury considered or decided the question whether or not a breach of the statutory requirements contained in s. 43(1) of The Highway Traffic Act was a contributory cause of the accident.

It appears to me good and proper practice in a case where a party maintains that the provisions of subss. 1, 2 and 3 of s. 43 of the statute are not applicable because of the exception contained in subs. 4 that a question be left expressly for the jury to find whether it was impossible to avoid temporarily a violation of such provisions. Appropriate directions should be given to the jury that if such a question be answered in the affirmative, they must disregard the provisions of subs. 1, 2 and 3 and if they answer the question in the negative they must then proceed to consider whether there was a breach of those provisions and whether such breach contributed to cause the loss or damage suffered by the claimant.

Counsel for the respondent did not argue that the parts I have quoted from the charge to the jury are right in law. He contends that no substantial wrong or miscarriage has been occasioned by the misdirection in the charge and relies upon the provisions of s. 28(1) of The Judicature Act, R.S.O. 1950, c. 190. I cannot accept his argument. I am satisfied that substantial wrong or miscarriage has been occasioned by misdirection in respect of the duties of both the appellant and the respondent in the particular circumstances of this case. On the one hand, the jury were directed that a statutory duty existed in law on the part of the appellant which did not exist. They were told that the appellant did not do what the statute required. They were directed that "not having obeyed the statute . . . the onus is on him [the appellant] to demonstrate to you that there was no negligence on his part in not having passed around to the left of the Pluard car". The jury found in part that "the evidence fails to reveal sufficient attempt on the part of Mr. Graydon Sheldon to avoid the collision". That part of their finding, in my opinion, might well have been influenced by and resulted from the misdirection in the charge. On the other hand an even greater wrong has been occasioned by the misdirection and non-direction in the charge in respect of the provisions of s. 43. The appellant has not had his complaint in respect of the conduct of the respondent put before the jury in accordance with the law applicable to the circumstances of the case. It cannot be properly said that there was a fair trial in accordance with the law. If the trial was not a fair one by reason of misdirection in the charge, it follows, in my opinion, that a substantial miscarriage or wrong has been thereby occasioned.

Counsel for the appellant argued also in this court that the quantum of damages assessed by the jury is excessive because of misdirection in the charge. In particular counsel pointed to the statements of the learned trial judge that "it is apparent that he [the respondent] is not going to be able to follow any work that he could do" and: "Is he going to be able to work again or is he not?" I do not deem it necessary or wise to comment on the evidence because of the order of this Court which, I think, is appropriate in the circumstances. I simply say that the impression may have been conveyed to the jury that the respondent was permanently or totally incapacitated for any work by reason of the accident and that such a view was not supported by the evidence before the Court.

It is my opinion that the trial was not satisfactory by reason of misdirection to the jury in the law applicable to the case. Therefore the judgment of the Court below should be set aside and a new trial should be had between the parties. The appellant should be allowed the costs of this appeal; the costs of the former trial and of the new trial, should be in the discretion of the judge presiding at the new trial.

HOGG J.A. (*dissenting*):—I have read with care and given serious consideration to the reasons for judgment of my brother Laidlaw and it is with regret that I find myself unable to concur in his disposition of this appeal. The material facts with which the case is concerned, and also the questions put to the jury by the learned trial judge and their answers thereto, are set out in the judgment of Mr. Justice Laidlaw.

The power given to the Court to grant a new trial of an action is found in s. 28 of The Judicature Act, R.S.O. 1950, c. 190, which reads in part:

"28. (1) A new trial shall not be granted on the ground of misdirection . . . or by reason of any omission or irregularity in the course of the trial, unless some substantial wrong or miscarriage has been thereby occasioned."

The question which this Court is called upon to determine in this appeal is whether, in the language of the statute, a substantial wrong or miscarriage has been occasioned by misdirection of the jury by the trial judge.

In a civil case the burden is on the appellant of showing that there was some substantial wrong or miscarriage: *Storry v.*

C.N.R., [1941] 4 D.L.R. 169, 53 C.R.T.C. 71, per Robertson C.J.O. at p. 174. In *Caswell v. Toronto R. W. Co.* (1911), 24 O.L.R. 339, it was said by this Court that a strong case must be presented before a new trial can be properly directed. One of the leading cases on this subject, and one which is very often cited, is *Bray v. Ford*, [1896] A.C. 44, in the House of Lords. Lord Herschell, in speaking of Order XXXIX, Rule 6, the provisions of which are similar to s. 28 of The Judicature Act which I have quoted, said:

"I should be sorry to say anything to narrow its scope further than the language employed seems to me to render necessary. In cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the Court think that the verdict of the jury is in accordance with the true view of the facts and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right to claim that the action should be tried by a jury."

Odgers on Pleading and Practice, 13th ed. 1946, at p. 284, states the principle to be that: "the Court will not grant a new trial if it is satisfied that the jury, if rightly directed, would still have returned the same verdict."

This subject was considered by the Court of Appeal in *Cooledge v. Toronto R. W. Co.* (1907), 10 O.W.R. 739, where Garrow J.A. said at p. 741: "In the face of such evidence no jury ought to find or probably would find in favour of the plaintiff, or, if they did so find, their finding should be set aside as contrary to the weight of evidence. That being the position, it appears to me that it is not in the interests of justice to permit a second trial. The plaintiff has had her chance, and has failed, and that should be an end of the matter."

In *Brenner v. The Toronto Railway Company* (1908), 40 S.C.R. 540, 8 C.R.C. 108, it was held by Girouard and Duff JJ., according to the headnote to the report in S.C.R., that "The judge's charge was open to objection but as under the findings of the jury and the evidence plaintiff could not possibly recover a new trial should be refused."

A comparatively recent appeal in which this subject was considered is that of *Fingland v. Brown and Garon*, [1943] O.R. 13, [1943] 1 D.L.R. 176. There had been a misdirection of the

jury as to the matter of onus under s. 48 of The Highway Traffic Act, R.S.O. 1937, c. 288. The jury found that want of care on the part of the appellant (the defendant) caused or contributed to the damages suffered by the plaintiff and they defined the appellant's negligence in clear terms. Mr. Justice Gillanders, who delivered the judgment of the Court, concluded his reasons for judgment with the following words:

"It seems apparent that the jury was not in doubt and had no difficulty in concluding that the appellant was at fault, and in stating clearly what, in its opinion, that fault was. On the whole case I do not think that in the circumstances any substantial wrong or miscarriage resulted."

It is true that the learned trial judge, at the trial of the present action, read to the jury subs. 11 of s. 41 of The Highway Traffic Act, which deals with the circumstances of one vehicle overtaking and desiring to pass another and provides that in such case the person driving the overtaking vehicle shall turn out to the left so far as may be necessary to avoid a collision and the driver of the vehicle which is overtaken shall not be required to leave more than one-half of the road free. I think he was in error in bringing this subsection to the attention of the jury as the facts of this case do not warrant its application, but I cannot hold that because this section of the Act was read to the jury any substantial wrong could be occasioned.

The trial judge also read to the jury part of the provisions of s. 43 of the statute, including that part which provides that the provisions of the section shall not apply to the driver of a motor vehicle which is so disabled while on the highway that it is impossible to move it off the travelled portion of such highway. When the jury was recalled after the conclusion of the learned judge's charge because of certain objections raised by counsel for the appellant, he instructed them that there was nothing in the evidence which showed any impossibility in removing the motor car from the travelled portion of the highway. However, immediately after directing the jury that there was no evidence on this point, he used the following language: "Now, was this car so disabled as to make it impossible to move it off the highway?"

I think the learned trial judge was again in error in stating there was not evidence with respect to this matter, as there was evidence which would entitle the jury to find that it was

impossible to move the car entirely off the travelled portion of the highway, but, as is shown by the quotation from the judge's remarks to the jury, he left this question to them for their consideration.

It would have been proper to have put to the jury a specific question in addition to the other questions the jury were asked to answer, as to whether it was impossible or not to move the motor car, but the evidence on this point was before the jury for their due consideration.

The findings of the jury are in every respect against the appellant. They negative negligence on the part of the respondent and find the appellant wholly responsible, by his lack of care, for the mishap. ". . . The jury was not in doubt and had no difficulty in concluding that the appellant was at fault", to use the words of Mr. Justice Gillanders which I have already quoted. In my view the evidence does not warrant any other findings of fact as to liability than those made by the jury. I think, therefore, it is to be concluded that in spite of misdirection on the part of the trial judge the jury nevertheless arrived at a verdict as to the responsibility for the accident in accordance with the true view of the facts and such as they would have given if they had been rightly directed. Basing my opinion upon the authority of the cases I have mentioned and the findings of the jury, I think that the misdirection did not constitute a substantial wrong or miscarriage.

Another objection raised to the trial judge's charge was that there was misdirection as to a certain fact in that portion of the trial judge's charge that related to the matter of damages. The respondent had been seriously injured and the learned trial judge told the jury that the respondent "is not going to be able to follow any work that he could do". This language is not apt in describing the condition of the respondent as depicted by the testimony given with regard to his capacity to work after the injuries which had been suffered by him. Before the accident the respondent was a foreman in connection with the work of installing water-mains by the Peterborough Utilities Commission. The medical evidence given on his behalf is to the effect that he could not engage, after the accident, in his former occupation in so far as standing or walking about was concerned. I think that when the words "any work that he could do" are

considered in connection with the evidence as to the work done by the respondent before he was injured, and with the medical evidence, the jury could conclude that the reference by the trial judge was directed to the work or kind of work the respondent could do before the accident, and that they did not necessarily conclude that the trial judge's language was to be taken as meaning that the respondent was in such physical condition as a result of his injuries that he could not engage in work of any kind. In any event, the jury heard the whole evidence given on this point and I do not think that this statement by the learned trial judge, upon a matter of fact alone, can be held to have occasioned such a substantial wrong or miscarriage as to entitle the appellant to have the damages again assessed.

For the reasons given, I think the appeal should be dismissed with costs.

GIBSON J.A. agrees with LAIDLAW J.A.

Appeal allowed with costs, HOGG J.A. dissenting.

Solicitors for the plaintiff, respondent: Elliott & Chandler, Peterborough.

Solicitor for the defendant, appellant: Arthur W. S. Greer, Oshawa.

[COURT OF APPEAL.]

Rex v. Kasperek.

Criminal Law—Insanity and Allied Defences—Amnesia or “temporary blackout”—Whether Defence Recognized in Law.

There is a well-recognized presumption in criminal law that a man intends his acts and intends the natural consequences of those acts. Exceptions exist in cases of insanity and of drunkenness, but the law cannot recognize a defence based upon amnesia or “temporary blackout”, where the accused, although he takes the position that he has not at any time been insane, contends that at the time he did the acts in question he was, because of such a mental state, incapable of forming any intent. *Rex v. Lesbini*, [1914] 3 K.B. 1116; *Rex v. Thomas* (1911), 7 Cr. App. R. 36, quoted and applied.

Where the accused, without denying the acts alleged against him, advances such a defence, and calls a psychiatrist who expresses an opinion to the effect that he was in such a mental condition at the time, the Crown is entitled to call other psychiatrists in reply to rebut that evidence, and it cannot be contended that the evidence should have been adduced as part of the Crown’s case in chief.

AN APPEAL from conviction before Gale J. and a jury.

1st and 2nd October 1951. The appeal was heard by ROBERTSON C.J.O. and ROACH and BOWLBY JJ.A.

Arthur Maloney, for the accused, appellant: 1. Evidence of Dr. Senn and Dr. Weber, called by the Crown in reply, was inadmissible on several grounds.

Dr. Senn was permitted to express an opinion based on foundational facts that were not established in evidence before the jury. The Crown knew in advance of our defence and elected to close its case without calling Dr. Senn, although his name was on the indictment and he had given evidence before the grand jury and was present in court. The trial judge refused to permit the cross-examination of the accused as to statements made by him to Dr. Senn, following *Rex v. Wilmot*, [1940] 2 W.W.R. 401, 74 C.C.C. 1, [1940] 3 D.L.R. 374, on the ground that the statements had not been tendered in evidence, and there was therefore no ruling as to their voluntary nature. A doctor in similar circumstances was also held to be a person in authority in *Rex v. Kingston* (1830), 4 C. & P. 387, 172 E.R. 752, and *Reg. v. Garner* (1848), 1 Den. C.C. 329, 169 E.R. 267, 3 Cox C.C. 175. *Rex v. Nowell*, [1948] 1 All E.R. 794, 32 Cr. App. R. 173, is distinguishable.

The trial judge was clearly right in refusing to permit cross-examination on a statement that had not been admitted in evidence: *Rex v. Treacy*, [1944] 2 All E.R. 229, 30 Cr. App. R. 93; *Rex v. Donnelly and Donnelly*, 20 M.P.R. 7, 89 C.C.C. 237,

4 C.R. 72, [1948] 3 D.L.R. 301; *Rex v. Chase*, 21 M.P.R. 396, 91 C.C.C. 265, 5 C.R. 488, [1948] 2 D.L.R. 608. But in spite of this correct ruling, when Dr. Senn himself was called the trial judge, after argument, permitted him to express an opinion based solely on those very statements.

The true basis for excluding a statement that is not shown to be voluntary is the possibility of its untruth: *Rex v. Mazerall*, [1946] O.R. 762, 86 C.C.C. 321, 2 C.R. 261, [1946] 4 D.L.R. 791. The same possibility would obviously vitiate Dr. Senn's opinion, because it was based on a statement that might be untrue.

Further, my submission is that Dr. Senn usurped the functions of the jury. [ROACH J.A.: Surely no more so than Dr. Gray, who was called for the defence?] It was for the jury to say which doctor's opinion was to be accepted, and how could they do that without knowing the basis on which Dr. Senn formed his opinion? Dr. Senn's evidence was clearly important to the jury because after three hours' deliberation they came back and had the whole of that evidence read to them.

An opinion is not admissible in evidence if it is based on material that is not before the jury: Phipson on Evidence, 8th ed. 1942, p. 385; *Wright v. Tatham* (1838), 5 Cl. & Fin. 670, 7 E.R. 559; *In re Dyce Sombre* (1849), 1 Mac. & G. 116, 41 E.R. 1207; *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 at 374; *The William Hamilton Manufacturing Company v. The Victoria Lumber and Manufacturing Company* (1896), 26 S.C.R. 96 at 108; *Fields v. Rutherford et al.* (1878), 29 U.C.C.P. 113 at 116.

Dr. Weber had only one brief interview with the accused, and his evidence was of an opinion formed as a result of his consideration of the hospital reports and of conversations with others, not before the jury. It was hearsay only, and not admissible.

In any event, the Crown should not have been permitted to call either of these witnesses in reply. This was not something that arose *ex improviso* and could not have been foreseen. A specific intent was an essential ingredient of the offence charged, and the Crown knew what our defence was to be. Because the evidence was admitted at this stage, we had no opportunity to explain, contradict or meet it. The whole course of the defence might have been different if the evidence had been given at the proper time: Archbold, Criminal Pleading, Evidence and Prac-

tice, 32nd ed. 1949, p. 187; *Rex v. Day* (1940), 27 Cr. App. R. 168 at 173; *Rex v. Harris*, [1927] 2 K.B. 587, 20 Cr. App. R. 86; *Rex v. Liddle* (1928), 21 Cr. App. R. 3.

2. The trial judge misdirected the jury as to the burden of proof, and as to the nature of our defence. There is no authority in this Province supporting the defence set up at the trial, *viz.*, an inability, because of mental condition, to form any specific intent, but such a defence, if established, should succeed on general principles. Here a doubt as to that capacity was suggested by the evidence of the accused and that of Dr. Gray, and the jury should have been instructed precisely as would have been done in a case of drunkenness. I refer to *Rex v. Flett*, 59 B.C.R. 25, [1943] 1 W.W.R. 672, 79 C.C.C. 183 at 189, [1943] 2 D.L.R. 656; Miller, Handbook of Criminal Law (Hornbrook Series), p. 134; *H. M. Advocate v. Ferguson* (1881), 19 Sc. L.R. 341; *H.M. Advocate v. M'Clinton* (1902), 4 Adam 1 at 25; *H.M. Advocate v. Dingwall* (1867), 5 Irv. 466; *H.M. Advocate v. Granger* (1878), 4 Couper 86.

It is no longer correct to say that there is a "presumption" that a man intends the natural consequences of his acts. There is an inference of intention, but it is an inference that *may* (not *must*) be drawn: *Hosegood v. Hosegood* (1950), 66 T.L.R. 735 at 738; *Rex v. Steane*, [1947] K.B. 997, [1947] 1 All E.R. 813, 32 Cr. App. R. 61; Stephen, History of the Criminal Law, 1883, vol. 2, p. 111; *Angus v. Clifford*, [1891] 2 Ch. 449; Russell on Crime, 10th ed. 1950, vol. 1, pp. 27, 30, 33.

Instead of a charge as in drunkenness the trial judge told the jury that the burden was on us, and left the impression that the defence, if established, was a complete answer to the charge, instead of one that could at most justify a verdict of assault causing actual bodily harm or common assault. As to the burden of proof in this connection I refer to *Taylor v. The King*, [1947] S.C.R. 462, 89 C.C.C. 209, 3 C.R. 475; *Rex v. Hrynnyk*, 56 Man. R. 380, 93 C.C.C. 100, 7 C.R. 141, [1949] 1 W.W.R. 129, [1949] 2 D.L.R. 394; *Latour v. The King*, [1951] S.C.R. 19, 98 C.C.C. 258 at 265, 11 C.R. 1, [1951] 1 D.L.R. 834.

3. The trial judge charged the jury as follows: "In your conclusion you must be unanimous; all of you must agree on whatever verdict you render." This is incorrect, because it tends to give the jury the impression that they must be unanimous,

and does not tell them of their right to disagree and fail to render any verdict: *Latour v. The King, supra*.

4. The sentence imposed is, in all the circumstances, excessive.

W. B. Common, K.C., for the Attorney-General, respondent:

1. Crown counsel, in attempting to cross-examine the accused as to what he told Dr. Senn, was not concerned with the truth or falsity of what the accused said, but only with what it revealed as to his recollection of events, and his capacity to form an intent. Dr. Senn was called in rebuttal with the same object in mind. There was no other way that the Crown could meet the defence evidence of Dr. Gray. The trial judge was correct in permitting Dr. Senn to give only his opinion, and not to state the facts told to him by the accused, which might have raised a collateral issue that would have had to be tried out: *Rex v. Gunewardene*, [1951] 2 All E.R. 290 at 294. [ROACH J.A.: That case does not seem to me to be a parallel one in any way.] It was *qua* confession, and in no other aspect, that the trial judge refused to admit, on the accused's cross-examination, any reference to what the accused told Dr. Senn. After this ruling Dr. Gray gave evidence of his opinion, based in part on his conversations with the accused, including the history of marital discord, which the doctor was permitted to give in evidence. Dr. Senn was then called in rebuttal—not to circumvent the trial judge's ruling, or to rebut the accused's evidence, but solely to rebut Dr. Gray's evidence in the matter of his opinion. [ROACH J.A.: But Dr. Gray gave the reasons for his opinion, while Dr. Senn was not permitted to state his reasons.] The fact that Dr. Senn might have been considered a person in authority if the accused's statement had been tendered as a confession cannot affect his evidence as to his opinion.

The course followed at this trial is the constant practice in cases where the accused's mental condition is in issue, although I know of no reported authority on it.

What I have said as to Dr. Senn's evidence also applies to that of Dr. Weber.

2. I know of no case where this point has been expressly determined, although it was mentioned in *Rex v. Flett*, 59 B.C.R. 25, [1943] 1 W.W.R. 672, 79 C.C.C. 183, [1943] 2 D.L.R. 656. It is to be noted that there was no objection to the charge in this

respect at the trial. The leading authority on drunkenness is of course *Director of Public Prosecutions (Rex) v. Beard*, [1920] A.C. 479, 14 Cr. App. R. 159, but that case, like both *MacAskill v. The King*, [1931] S.C.R. 330, 55 C.C.C. 81, [1931] 3 D.L.R. 166, and *Taylor v. The King*, [1947] S.C.R. 462, 89 C.C.C. 209, 3 C.R. 475, was one of homicide, and the question was as to reducing the offence from murder to manslaughter. Dr. Gray's evidence comes perilously close to irresistible impulse, which has never been accepted as a defence in any criminal case. There is no definite evidence that the accused was incapable of forming an intent, and there was no duty on the trial judge to charge the jury according to the *Beard* case.

Surely it is not necessary in every case where a specific intent is set out in the statute for the trial judge to charge the jury as to all included offences. Parliament, by specifying the intent, has not added anything to the general law as to *mens rea*, which is included in practically every offence of commission.

3. What Fauteux J. said on this point in the *Latour* case, *supra*, was wholly obiter. He did not say that there would have to be a new trial on this ground alone. Every jurymen in this Province must know that he has a right to disagree.

Even if any one of these three grounds might otherwise succeed, the appeal should still be dismissed under s. 1014(2) of The Criminal Code, R.S.C. 1927, c. 36, since the jury could not reasonably have come to any other conclusion on the evidence.

4. I concede that this sentence is a severe one, having regard to the undoubted mental stress existing at the time, but I cannot agree that a reformatory term would be adequate.

Arthur Maloney, in reply: Dr. Senn's opinion as to the accused's ability to remember what had happened would be valueless if it was based on a statement that, though plausible, was completely false. [ROACH J.A.: But the reason that Dr. Senn did not give the conversation on which he based his opinion was that counsel for the accused had objected to any cross-examination of the accused as to that conversation, and did not himself cross-examine the doctor about it. Does it lie in your mouth now to object?] We were entitled to assume, when the ruling was made, that nothing more would be heard of our client's statement to Dr. Senn. We could not cross-examine the doctor about it, because at that stage there was no possi-

bility of our contradicting him. It may be that the trial judge made an error when he gave effect to our original objection, but having done so he should not have placed us in the position he did.

The point I take could not arise in a case where insanity was the issue, because of s. 19(3), which places the onus on the accused. There is no such onus, or statutory presumption, here.

With very few exceptions, every crime involves an element of *mens rea*, but in addition some crimes involve a specific intent. It is only in relation to such a specific intent that either drunkenness or the defence we raised here could be relevant. On fundamental principles any evidence is relevant and material that tends to negative one of the essential elements of the offence charged.

Cur. adv. vult.

1st November 1951. The judgment of the Court was delivered by

BOWLBY J.A.:—The appellant was indicted at the city of St. Catharines at the assizes presided over by Mr. Justice Gale for “THAT on the 28th day of June, 1950, at the City of St. Catharines, in the County of Lincoln, Frank Kasperek, with intent to murder one, Mary Kasperek, his wife, he did shoot at her with a repeating shotgun and attempt to strangle her contrary to Section 264(c) and (d) of the Criminal Code of Canada”. The trial commenced on the 5th and concluded on the 10th February 1951, when the jury returned a verdict of: “Not guilty as charged. Guilty of wilful shooting with intent to maim and do grievous bodily harm.” On the 13th February 1951 Mr. Justice Gale sentenced the appellant to imprisonment for a period of 10 years.

The prisoner appeals against both conviction and sentence. As to the conviction Mr. Maloney submits that there should be a new trial, urging the following grounds:

1. That the evidence of Dr. Senn and Dr. Weber, called by the Crown in reply, was inadmissible.
2. That the learned trial judge misdirected the jury with reference to the burden of proof, having regard to the defence of the prisoner.

3. That the learned trial judge erred in instructing the jury in the words: "In your conclusion you must be unanimous; all of you must agree upon whatever verdict you render."

At the conclusion of the argument the members of the Court were unanimously of the opinion that the appeal based upon grounds numbered 2 and 3 failed, but held over for consideration ground numbered 1. Before dealing with the submissions advanced on behalf of the appellant it is necessary, in my opinion, to review as briefly as possible certain facts disclosed by the evidence which are not in dispute and the course the trial took, including the novel defence of the prisoner.

The appellant and his wife were married in St. Catharines in 1931. For a number of years he owned and carried on there a business known as "Frank's Auto Body", until 1945, when, upon his doctor's advice, he sold that business. In 1946 he bought a 213½-acre farm upon the Queen Elizabeth Way, approximately four miles from St. Catharines, at a price of \$58,000, paying \$16,000 in cash and arranging the balance by mortgages. At the time of his arrest he had reduced the first mortgage from \$38,000 to \$14,000, which shows that he was an industrious, hard-working and resourceful person. The title to the farm has always been in the names of himself and his wife. Marital differences arose shortly after their marriage in 1931 and continued through the years, at times reaching the stage of violent quarrels. For a number of years the appellant suffered from a chronic bronchial condition which weakened him physically. It is clear upon the evidence that he was continuously suspicious of the actions of his wife with other men. The wife was also ill from time to time with nervous and other disorders. On 13th May 1950 a violent quarrel occurred during which blows were struck and the appellant, assisted by his son and nephew, tied the wife's feet together and her hands behind her back and left her that way for about an hour. A doctor was finally called and she was taken to hospital. The appellant admitted these facts. The wife never returned to the farm but went on 22nd May 1950 to the home of a Mrs. Serafin at 167 Queen Street, St. Catharines. On the same day, 22nd May 1950, a summons was issued and served upon the appellant charging that he did on the 13th May 1950 assault his wife and occasion her actual bodily harm. That was returnable in magistrate's court in St. Catharines

on 30th May 1950 but was adjourned from time to time and at the time of this trial had not come on for hearing. On 19th June 1950 the wife's solicitors issued a writ of summons in the Supreme Court claiming alimony and on the same date commenced proceedings under s. 12 of The Married Women's Property Act, R.S.O. 1937, c. 209, for an order declaring the wife to be the owner of a one-half interest in the farm and chattels thereon. The writ of summons and the notice of motion under The Married Women's Property Act were both served upon the prisoner on 20th June 1950 and the motion was returnable before the judge of the County Court of the County of Lincoln in St. Catharines at 10 o'clock in the forenoon of 28th June 1950, the date of the instant offence.

I now deal with the trial. The case for the prosecution was that at approximately 9 o'clock in the forenoon of 28th June the appellant drove his motor car to, and stopped at, the premises of Mrs. Serafin above mentioned. The appellant walked to the back door, which was opened by his wife. The appellant stated that he had a parcel for her and went back to his motor car. He then returned to the back door and entered what is referred to as a sun-porch, with a shot-gun wrapped in a piece of carpet, which the wife recognized as having come from their home on the farm. The carpet then fell off the gun and the prisoner pointed the gun at his wife. The wife grabbed the gun, a struggle ensued and the appellant struck his wife several times with the gun, knocking her to the floor. While she was on the floor he continued to strike her and she did her best to hang on to the gun. The appellant fired the gun, but at the same instant the wife pushed the gun away and the shot missed her. The wife was then able to jump up and run from the sun-porch into the kitchen. The prisoner began smashing the kitchen door, another shot was fired, and the wife ran upstairs, first to her own bedroom and then to Mrs. Serafin's bedroom where she closed the door. The appellant forced his way into the bedroom and another struggle ensued during which the appellant dropped the gun and the wife shoved it out of his reach.

Meanwhile Mrs. Serafin, when the struggle in the sun-porch commenced, ran upstairs and called for help through a window, and before long police officers arrived. They found the wife

flat on the floor on her back in the bedroom and the appellant sitting astride her and choking her with his left hand. The police ordered him to stop and he paid no attention but mumbled, "I kill her." The police struck the appellant twice on the side of the head before he released his hold. The appellant shortly afterwards seemed to collapse and the police dragged him from the room and arrested him. The police found two exploded shot-gun cartridges, removed four live shells from the gun and found five live shells in the appellant's pocket. The wife identified the shot-gun in question as one owned by the prisoner and kept on the farm for a long time. The evidence of the facts above related was given by the wife, Mrs. Serafin and the police officers.

Counsel for the prisoner, before calling any evidence, opened to the jury and stated that the defence was that the prisoner had at the time of the alleged offence suffered an attack of "amnesia" in the form of a "temporary blackout", which made it impossible for the prisoner to have formed any criminal intent or intent of any kind. Counsel definitely stated that insanity was not being set up and that position has been maintained throughout.

The prisoner did not deny or call any evidence to deny what took place at the Serafin house, as sworn to by witnesses for the Crown. He gave evidence and stated that early on the morning in question he drove his motor car to St. Catharines and various places to bring certain persons to the farm to work. After he arrived back at the farm he himself went out in the field to look at the peaches, it being then 8 to 8.15 o'clock in the morning. He then testified that he had no memory or recollection whatever of anything that happened thereafter until he was being taken to the police station by the police officers.

Dr. Kenneth Gray, a professor of psychiatry at the University of Toronto, and a member of the staff of the Toronto Psychiatric Hospital, was called as the last witness for the defence. He stated that he had examined the prisoner six days before the trial, that he had examined the records of the Mount Hamilton Hospital where the prisoner had been a patient under observation for a period of time after his arrest, that he had been in the court-room and heard all the evidence adduced on behalf of the Crown and the defence, and he gave it as his

opinion that the prisoner, at the time of the alleged offence, was suffering from two mental conditions: first, a condition of mental depression, and second, a condition of loss of memory and amnesia. Dr. Gray proceeded, at considerable length, to give his reasons for his opinion and to describe and define amnesia.

Following the arrest of the prisoner the Department of the Attorney-General had ordered an examination by Dr. N. J. Senn, a psychiatrist and superintendent of the Ontario Hospital at Hamilton, for the purpose, of course, of ascertaining whether or not the prisoner was insane at the time of the commission of the offence. On 4th July 1950, seven days after the arrest, Dr. Senn went to St. Catharines and had an interview with the prisoner in a corridor of the gaol. Subsequently, the prisoner was removed to the Ontario Hospital at Hamilton where he remained from 11th July to 7th September 1950, during which period Dr. Senn talked to the prisoner three or four times each week. During the cross-examination of the prisoner by Crown counsel a question was asked the prisoner relating to the interview with Dr. Senn at the gaol on 4th July 1950. This was immediately objected to by counsel for the prisoner and the jury was sent out while the matter was argued. It was contended by counsel for the defence that Dr. Senn not having been called by the Crown, and thus it not being known whether any statements made by the prisoner to Dr. Senn were or were not of a voluntary nature, Crown counsel should not be permitted to cross-examine the prisoner in regard to anything said by the prisoner to Dr. Senn. After quite a long discussion over the point, in the middle of which Court adjourned overnight, the learned trial judge rather hesitatingly ruled that Crown counsel must refrain from asking the prisoner any questions pertaining to the interview on 4th July.

The trial then proceeded and the defence closed with the evidence of Dr. Gray above referred to. The Crown then called in reply Dr. Senn. No objection was taken by counsel for the prisoner to Dr. Senn being called, in reply to opinions expressed by Dr. Gray. Early in his evidence, however, it was made clear to the Court that counsel would object to Dr. Senn stating what the prisoner had said on 4th July regarding particulars of what occurred on 28th June, between 8 and 9.30 in the forenoon. Dr. Senn then testified that he, on 4th July, discussed with the

prisoner the latter's life history; that he had talked to the prisoner two to four times a week while he was kept in the hospital under observation, and that he had decided by 11th September 1950 that the prisoner had been sane at the time of the commission of the offence and was quite fit mentally to stand trial and had therefore had him returned to the gaol. Then the following took place in Dr. Senn's evidence in chief:

"MR. LANCASTER [Crown Counsel]: Q. Now, then, Doctor, I want to go back to the end of the first period that you refer to, before 28th June, and you will help me and the Court if you will delay answering my questions until his Lordship has ruled. During your interview with him at the gaol did you gather any conclusions as a result of that interview that would indicate to you that he had recollections of the events that took place on June 28th?

"HIS LORDSHIP: I see nothing wrong with that, Mr. Fleming [counsel for the prisoner]. Right. A. Yes, I have such information.

"HIS LORDSHIP: Just a minute. Now what was the question?

"THE REPORTER: 'During your interview with him at the gaol did you gather any conclusions as a result of that interview that would indicate to you that he had recollection of the events that took place on June 28th?'

"MR. FLEMING: My Lord, I just wonder if the reporter would make sure whether the article is used there or not. The way I took it down, and I thought I had my friend verbatim, was that he said 'of events'.

"THE REPORTER: I have 'of the events', Mr. Fleming.

"HIS LORDSHIP: I prefer to rely on the reporter; I should like to be sure that I understand the scope and effect of the questions. When you answered that, Dr. Senn, did you have in mind events during the period from 8 o'clock until, say 9.30, or were you directing your mind to subsequent events during that day? A. No, it was during that period, my Lord.

"MR. LANCASTER: That, my Lord, was to be my next question.

"HIS LORDSHIP: Oh, all right.

"MR. LANCASTER: Q. So that you have told his lordship that the events of June 28th that you referred to in answering

the question, included the happenings or events between 8 and 9.30 that morning? A. Not all of the events, Mr. Lancaster, no.

"Q. No, but some of them? A. Correct.

"Q. Now, don't answer this. Did they cover an event or the events having to do with the gun that has been put in here?

"HIS LORDSHIP: No.

"MR. FLEMING: My Lord, I certainly must object to that.

"MR. LANCASTER: I don't see what is wrong with that, my Lord. It is still not asking for any statements or anything at all other than—did the recollection as indicated to the doctor on that occasion cover the gun, under any circumstances?

"MR. FLEMING: The gun on that morning, I understand.

"MR. LANCASTER: The gun on that morning, yes.

"HIS LORDSHIP: I think perhaps I will ask you, gentlemen, to step out while we have a heart-to-heart talk about this thing.

"The jury retired at 10.30 a.m., and Dr. Senn left the witness-box."

Thereupon another long discussion took place between counsel and the Court, at the conclusion of which, acceding to submissions made by counsel for the prisoner, the learned trial judge ruled that counsel for the Crown should refrain from framing his questions in such a way as to indicate what was said by the accused to Dr. Senn. Then the jury returned and the examination of Dr. Senn continued as follows:

"Q. Dr. Senn, you have already told us that by reason of your examination, mental examination, of Kasperek on July 4th, you formed the opinion that he had a recollection of events that occurred on the morning of June 28th? A. That is correct.

"Q. And did you form the opinion that he had recollection of the events that took place throughout the morning of June 28th?

"MR. FLEMING: My Lord, he has already answered that.

"MR. LANCASTER: There is no reason why I shouldn't ask it again.

"HIS LORDSHIP: He said not all events, but some of them. Again I assume that counsel, and I assume the witness, are talking about the important hour or hour and a half from 8 to 9.30?

"MR. LANCASTER: Yes.

"THE WITNESS: That is correct.

"HIS LORDSHIP: You appreciate that? A. That is correct.

"MR. LANCASTER: I am directing my questions now to a recollection of events from 8 to 9.30 on the morning of June 28th? A. My opinion was that he could recall what had happened.

"Q. And then does it follow, Doctor—well, I will put it another way. What is your opinion then as to whether or not having regard to the events from 8 to 9.30, there was any amnesia? A. My opinion is that there was no amnesia at that time."

Then followed evidence of Dr. Senn describing and defining amnesia, during which he stated that in his opinion it was quite possible for the prisoner, even though he later had no memory of the events that actually occurred between 8 and 9.30 o'clock on the morning in question, to have been quite capable during that period of time of reasoning matters out and forming intent, all of which evidence was proper reply and none of which was objected to.

Mr. Maloney now contends that the evidence of Dr. Senn, transposed herein *verbatim*, was not admissible and was so prejudicial to the appellant that a new trial should be directed. He puts his submission upon the broad ground that statements made by the prisoner to Dr. Senn six days after arrest not being admissible, any opinion based thereon was inadmissible. It is to be noted that at no time did the Crown tender any statement made by the prisoner in the form of a confession. Nor was the truth or falsity of any statement made by the prisoner an issue at the trial. What was given by the witness Senn was professional opinion based on a number of interviews with the prisoner including the interview of 4th July, during which the prisoner related certain events that occurred between 8 and 9.30 o'clock in the forenoon of 28th June, the witness testifying as to none of such events. In my opinion that was perfectly proper evidence.

It is also contended that the Crown, being aware of the defence that was to be advanced, and the onus being on the Crown to prove criminal intent, should have called Dr. Senn as part of the case against the prisoner and not have withheld his evidence for reply. With this contention I cannot agree. The evidence called in the first instance by the Crown proved a strong case against the prisoner. It was to be presumed, of course, having regard to what was proved, that the prisoner intended the natural

consequences of his acts and it would, in my opinion, approach the absurd to say that the Crown should also have called Dr. Senn to establish that the prisoner had not at the time been suffering from some mental disturbance which might have prevented him from intending to do wrongful acts.

It is also contended that Dr. Weber's evidence called in reply was inadmissible. Dr. Weber is a medical doctor who specializes in psychiatry, is assistant superintendent at the Ontario Hospital at Hamilton, and had a wide experience in the last war in the Army Medical Corps studying the emotional outlook of recruits and deciding whether they were fit to continue in service. He based his opinion in this case on a careful study of the appellant's hospital records and one interview with the appellant. He gave it as his opinion that the appellant did not suffer from amnesia, and that on 28th June the prisoner was fully able to appreciate and intend the consequences of his acts. His evidence was not objected to by counsel for the defence. It is contended (1) that Dr. Weber's evidence was based on hearsay, and (2) that the evidence was not called in reply to a matter which arose *ex improviso*, which no human ingenuity could foresee. I cannot agree with either contention. It is unnecessary to repeat what I have already said in dealing with Dr. Senn's evidence.

I might add, however, that had objection been taken to the propriety of calling either Dr. Senn or Dr. Weber to give rebuttal evidence, the rejection or reception of the evidence would have been a matter in the discretion of the learned trial judge: *Rex v. Crippen*, [1911] 1 K.B. 149, 22 Cox C.C. 289. No such objection was made. I might say that in my opinion the evidence of both was proper and admissible.

Before leaving this appeal I desire to comment generally upon the defence put forward in this case. In our jurisprudence it is presumed that a prisoner intended to commit an act and intended the natural consequences of his acts. To that presumption there are two recognized defences, (1) insanity and (2) drunkenness. It is not necessary to deal with either of these in detail. The principles are well known. In the case at bar the appellant attempted to set up what is termed "amnesia" or "temporary blackout" and at the same time he, through his counsel, unqualifiedly maintained throughout that he was not at any time insane. Such a position is, in my opinion, untenable. In *Rex v.*

Lesbini, [1914] 3 K.B. 1116, 24 Cox C.C. 516, Lord Reading C.J. said at p. 1120: "This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts." In *Rex v. Thomas* (1911), 7 Cr. App. R. 36, Darling J., delivering judgment for the Court of Criminal Appeal, said at p. 37: "Impulsive insanity is the last refuge of a hopeless defence."

In the case at bar the appellant attempted to raise a defence new in our law. In my opinion, there is no such defence and such a defence should not be recognized by our Courts. The only conceivable defence to the presumption mentioned, other than insanity or drunkenness, might be that at the time of the commission of the offence the prisoner was walking in his sleep or otherwise acting with his mind a total blank. It is difficult to imagine how such a defence could be proved.

In my opinion the appeal against the conviction must be dismissed.

The appeal against sentence, in my opinion, deserves consideration. The appellant, prior to this conviction, had, so far as the record shows, a past free of crime and a respectable background. As stated early in these reasons, he has been an industrious, resourceful person. While, but for the arrival of the police, the wife might have been killed, the fact remains that she was not injured beyond temporary discomfort. In my opinion the sentence of the Court should be imprisonment for a term of three years, dating from 13th February 1951, the date of original sentence, any time spent in custody during appeal to count upon such term.

Conviction affirmed; sentence reduced.

Solicitor for the appellant: Arthur E. Maloney, Toronto.

[COURT OF APPEAL.]

Rex v. Clark et al.

Criminal Law—Conspiracy—Special Rules of Evidence—Acts and Declarations of One Conspirator as Evidence against Other—Limits of Rule—Inadmissibility of Acts and Declarations Done or Made after Conspiracy Carried out or Frustrated—Statements to Police after Arrest.

The basis of the rule permitting the use of acts and declarations of one conspirator as evidence against another conspirator is that once the agreement, which is the essence of the conspiracy, is established, the acts of each conspirator in furtherance of the common object are regarded as being done on behalf of all. The acts and declarations, therefore, to be admissible, must be done or made in furtherance of the common design, i.e., as part of the *res gestae*, in the execution of the conspiracy. An act done or a statement made by one of the conspirators after the common object has been either effected or frustrated is not admissible in evidence against the others. *Reg. v. Blake and Tye* (1844), 6 Q.B. 126, applied. It follows that a statement made to the police by one alleged conspirator after his arrest is evidence only against the accused who actually made the statement.

Criminal Law—Overlapping Offences—Possession of Burglars' Tools, including Explosive Substance—Whether Conviction for Possession of Explosives also Permissible—The Criminal Code, R.S.C. 1927, c. 36, ss. 114, 464.

There is no inconsistency or repugnancy between ss. 114 (possessing explosives) and 464 (possessing burglars' tools) of The Criminal Code, and one who is found in possession of instruments of housebreaking, which instruments include explosive substances, may properly be convicted under both sections in respect of that possession. *Rex v. Quon*, [1947] O.R. 856; [1948] S.C.R. 508, distinguished.

Evidence—Confessions—Admissibility—Warning by Police—Warning Relating to Different Offence.

A person in custody was told by the police that he was arrested for being in possession of burglars' tools and was asked in the usual form if he wished to say anything in answer to the charge. He made a statement which was later tendered in evidence against him on his trial for conspiracy to commit a burglary (the evidence on that trial being later used, by agreement, on the trial for the other offence). *Held*, the statement was properly admitted in evidence on the trial for conspiracy. What was said on this question in *Rex v. Dick*, [1947] O.R. 105 at 123-4, was inapplicable in the circumstances. The charge of possession of burglars' tools was no trivial charge, and it was intended to proceed on that charge. The possession of the tools was relevant to the conspiracy charge, since it constituted an overt act which helped to establish the antecedent conspiracy.

Evidence—Accomplices—Who is Accomplice—Assistance Given in Carrying out Purpose of Conspiracy.

One who knows that other persons have agreed to commit a crime, but is not a party to that agreement, and does acts designed to assist in the carrying out of the crime, is not an accomplice in the offence of conspiracy, although he may be an accomplice in the substantive offence if it is committed. *Rex v. Dumont* (1921), 49 O.L.R. 222; *Rex v. Morrison* (1917), 51 N.S.R. 253, referred to.

APPEALS by Joseph Clark, Paul Lachek, John Kemp and James Fraser from their convictions before Forsyth Co. Ct. J., in the County Court Judges' Criminal Court of the County of

York, and from the sentences imposed. The nature of the convictions, and the sentences, appear in the reasons for judgment.

3rd, 4th and 5th October 1951. The appeals were heard by ROBERTSON C.J.O. and ROACH and BOWLBY JJ.A.

P. B. C. Pepper, for the accused Fraser and Kemp, appellants:

1. As to Fraser, on the charge of conspiracy, the sole evidence was that of the Crown witness Rene Morrison, who was an accomplice. The trial judge indicated clearly that he was not willing to convict on Morrison's evidence alone, without corroboration, but he treated as corroboration what could not amount to corroboration in law. There are at least three things that make her an accomplice: (a) she placed a cardboard over a flash-light lens at Fraser's request; (b) she assisted Fraser in fabricating an alibi; and (c) she went with Fraser, after the frustrated break-in, to look over the area. These matters clearly bring her within s. 69(b) of The Criminal Code, R.S.C. 1927, c. 36. I refer to Tremear's Criminal Code, 5th ed. 1944, p. 1265. The mere manufacturing of an alibi would make her a party to any offence subsequently committed.

Where a trial judge, sitting without a jury, is faced with the necessity for convicting on the uncorroborated evidence of an accomplice, he must at least state expressly that he believes that evidence, and must not rely on other evidence as "substantiating" it unless that other evidence is capable in law of furnishing corroboration: *Rex v. Tanzola*, [1944] O.W.N. 616, 82 C.C.C. 202.

It is true that there was corroboration of Morrison's evidence as against other accused, but there was none as against Fraser. The evidence should therefore not have been relied on as against him: *Rex v. Baskerville*, [1916] 2 K.B. 658 at 669, 12 Cr. App. R. 81.

2. The trial judge erred in specific matters in his reasons for judgment; in particular, he referred to Morrison's evidence as "uncontradicted", which it was not. It was contradicted in several particulars, and not only by the appellants.

3. The theory of the defence at the trial was that Morrison's evidence was sheer fabrication. Had there been a jury, the judge would undoubtedly have been bound to tell them that she might be an accomplice, and to give the customary warning. Sitting alone, he must therefore make an express finding, and in the

absence of such a finding it will be assumed that he overlooked the question: *Ungaro v. The King*, [1950] S.C.R. 430 at 432, 437, 96 C.C.C. 245, 9 C.R. 328, [1950] 2 D.L.R. 593. [ROACH J.A.: Surely he does expressly find that she is an accomplice.]

4. We were not permitted, at the trial, to put in our full answer and defence on behalf of Fraser. We wished to put in evidence all the letters written by Morrison to Fraser while he was a prisoner awaiting trial, but were not allowed to do so. The production of all of these letters would have buttressed our argument that her evidence was fabricated, and was invented to shield herself against the charge which had in fact been laid against her, but was later withdrawn.

5. As to Kemp, the evidence is very meagre, and the principal evidence is inadmissible. This is the evidence of Morrison as to a visit paid by Kemp to her house, with Fraser, *after* the arrest of the other two accused, and as to what was said on that occasion. The acts and declarations of one conspirator are evidence against another only when they are in pursuance of the common intention, and this evidence related entirely to what took place after the object of the conspiracy had been frustrated: Tremear, *op. cit.*, p. 651; Phipson on Evidence, 8th ed. 1942, p. 89. [ROACH J.A.: But this is not evidence of the declaration of one co-conspirator; it is evidence of something said in Kemp's presence and not objected to by him.] Even if this evidence was properly admitted, it does not show that Kemp was a party to any offence.

The mere fact that conspiracy is charged does not permit the Crown to play fast and loose with the rules of evidence. At the point in the trial where this evidence of Morrison was given there was no *prima facie* evidence of conspiracy against Kemp, and on the whole case there is not enough evidence to justify his conviction.

6. As to the conviction for possession of explosives, the explosives found at the scene of the crime are nowhere identified as having been in the possession of my clients. Morrison said Fraser had "a" $\frac{3}{4}$ -ounce bottle of nitroglycerine; the police found two bottles, one a 2-ounce and one a 3-ounce bottle. The trial judge, in adjudicating on these charges, should have disassociated his mind from the first conviction, and he did not do so. If the conviction for conspiracy is disregarded there is no evidence of

a common design, and there can therefore be no finding of attributed possession.

J. G. White (*S. Paikin*, with him), for the accused Clark, appellant: 1. All the convictions of my client, except that for transporting weapons, rest on the finding of a plot as charged. But the Crown wholly failed to establish the existence of a plot (a) to which all four accused were parties, and (b) the object of which was to break and enter the Roselawn Dairy. As to element (a), Morrison never saw Clark, and did not identify him at any time until the preliminary hearing. As to (b), the only mention of the Roselawn Dairy by Morrison is the statement that she went to its neighbourhood after the frustration of the plan, and even then no one pointed out the Roselawn Dairy as the object of the plot. Her evidence as to what Fraser told her does not bind Clark and is not evidence against him. None of Fraser's boasting was in furtherance of the object of the conspiracy. The mere presence of Clark and Lachek near the dairy does not prove that they were parties to a conspiracy with the other accused, but only that they were bent on some criminal act. [ROACH J.A.: But even if the Crown had failed entirely to connect Fraser and Kemp with the scheme that would not necessarily have exonerated Clark and Lachek.] We would then not be guilty of the conspiracy charged, although possibly we might be guilty of some other plot.

2. There is no evidence that a breaking and entering was the object of the conspiracy, as charged, and the trial judge finds as a fact that the conspiracy was one to "rob" the Roselawn Dairy. The mere possession of explosives does not prove that the accused did not intend, *e.g.*, to enter through an open window, and if that was their intention the conspiracy was not one to break and enter.

3. The trial judge apparently reversed the onus, by saying there was "no reason that Rene Morrison's evidence should not be accepted", that her evidence "stands uncontradicted", that there was no reason to "reject" it, and no evidence to "disprove" it: *Latour v. The King*, [1951] S.C.R. 19, 98 C.C.C. 258, 11 C.R. 1, [1951] 1 D.L.R. 834.

4. The trial judge used such words as "I think", the evidence "would appear to indicate". This is not enough, and does not evince a moral certainty of guilt, but rather a reliance on a preponderance of probabilities.

5. As to Rene Morrison as an accomplice, and the corroboration that was required, I refer to *Rex v. Lovering*, [1948] O.R. 565, 92 C.C.C. 65, 6 C.R. 67. The trial judge clearly abandoned his judicial function to determine whether or not Morrison was an accomplice. If he did in fact find that she was an accomplice, then he did not apply the correct test to the other evidence, when he said that her evidence must be "scanned" with great care, and should be "substantiated": *Rex v. Ignat*, 57 Man. R. 473, 96 C.C.C. 200, 9 C.R. 292, [1950] 1 W.W.R. 304.

6. The charge is one for conspiracy to break and enter, but nowhere in the evidence, or in the findings of fact, is breaking and entering referred to; the trial judge throughout refers to a conspiracy to "rob".

7. Clark's confession was wrongly admitted in evidence, since he was improperly handcuffed, and this unauthorized use of force constituted coercion in itself, as did the unjustified removal of the prisoner from the gaol to the police station: *Hamilton v. Massie et al.* (1889), 18 O.R. 585; *Yakimishyn v. Bileski*, 54 Man. R. 71, 86 C.C.C. 179, [1946] 1 W.W.R. 663, [1946] 3 D.L.R. 390. Further, even if the confession was properly admitted on the charge of possessing instruments of housebreaking, it should not have been admitted on the conspiracy charge, since the warning that preceded it referred only to the possessing charge: *Rex v. Dick*, [1947] O.R. 105, 87 C.C.C. 101, 2 C.R. 417, [1947] 2 D.L.R. 213. At the very least it can be said that the admissibility of the confession was doubtful, and the trial judge should therefore have exercised his discretion by rejecting it: *Rex v. Godwin*, [1924] 2 D.L.R. 362 at 372.

8. As to the convictions for possession, the explosives were not in Clark's physical possession, and therefore control by him must be established. Further, we were convicted for possession of the nitroglycerine under two different sections, which is contrary to the decision in *Rex v. Quon*, [1948] S.C.R. 508, 92 C.C.C. 1, 6 C.R. 160, [1949] 1 D.L.R. 135.

If, following the conviction of several persons for conspiracy, a new trial of one is ordered on grounds applicable only to that one, there must be a new trial of all the accused: Russell on Crime, 10th ed. 1950, p. 1801 (vol. 2).

H. M. McMaster, for the accused Lachek, appellant: The automatic pistols and some of the housebreaking instruments

were found, not in the car but up the lane, with the explosives. All four accused were charged and convicted in respect of the explosives, but only Clark and Lachek in respect of the pistols and instruments. If the reason for including my client in these latter charges was that he had been an occupant of Clark's car, then the conviction should be set aside under *Rex v. Watson*, [1943] O.W.N. 72, 79 C.C.C. 77, [1943] 2 D.L.R. 44.

As to the conspiracy charge, there is no evidence, admissible against us, that the object of the conspiracy was to break and enter the Roselawn Dairy. Fraser's statement to Morrison, while it might be evidence against Kemp, is not evidence against us: Tremear, *op. cit.*, p. 651.

W. B. Common, K.C., for the Attorney-General, respondent: 1. Having regard to Morrison's peculiar position, she could not be held to be an accomplice in the conspiracy, although she might have been in the attempt to break and enter. It is doubtful whether anyone can be an accomplice in a conspiracy. In any case, the mere act of accompanying Fraser to establish an alibi cannot make her an accomplice, nor can her other acts—she did not originate either idea, but merely did what she was asked to do. She had knowledge of the conspiracy, and no more. *Rex v. Tanzola*, *supra*, is wholly distinguishable on its facts. I refer to *Rex v. Dumont* (1921), 49 O.L.R. 222, 37 C.C.C. 166, 64 D.L.R. 128; *Rex v. Zoccato and Burleigh*, 82 C.C.C. 71, [1944] 3 D.L.R. 641. Morrison's acts relate to a purely collateral matter (the breaking and entering) and had nothing to do with the unlawful agreement.

If this argument is correct, what the trial judge said about Morrison's evidence being "substantiated" does not matter. But even if she is an accomplice, there is sufficient corroboration in the flashlight and the nitroglycerine, and also the drill-bits, to which she referred. In any case, the trial judge was entitled to convict without corroboration, and he clearly had the correct rule in mind.

2. The letter that the defence sought to adduce in evidence added nothing to the letters already filed as exhibits, and in any case the trial judge was made fully aware of the nature and significance of this letter.

3. As to Kemp, the evidence of what Fraser said on the return to Morrison's living-quarters is not evidence of the decla-

ration of one conspirator, but is admissible on wholly different grounds. There is a mass of evidence, apart altogether from Morrison, *e.g.*, in Kemp's association (admitted by him in his statement) with the drill.

4. As to Clark, there is ample evidence leading to the irresistible inference that the agreement was to break and enter the Roselawn Dairy. It is true that there is no direct evidence as to the physical object of the conspiracy, but this was unnecessary in view of the other evidence. There is ample evidence in Clark's statement, if it is accepted, and in the fact that Clark was found in actual possession of the drill.

5. There was nothing improper about moving Clark from the gaol to the police station, or about the handcuffing. Nowhere is it laid down categorically that handcuffing a prisoner *per se* renders a statement involuntary. Clark himself did not complain of coercion. The fact that the warning related only to the charge of possession does not make the statement inadmissible on the conspiracy charge: *Beatty v. The King*, [1944] S.C.R. 73, 81 C.C.C. 1, [1944] 1 D.L.R. 689; *Prosko v. The King* (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340. No warning at all is necessary, if it is affirmatively established that the statement was voluntary in the accepted sense: *Boudreau v. The King*, [1949] S.C.R. 367, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81. In any event, there is ample evidence apart from the statement. *Rex v. Dick*, *supra*, when carefully read, is not authority for the broad proposition that a warning in respect of a minor crime makes a confession inadmissible on a trial for a more serious crime.

6. *Rex v. Quon*, *supra*, has no application to the facts of this case. Explosives are not necessarily instruments of house-breaking, and they may be illegally possessed for many purposes other than housebreaking. These are clearly separate offences, which may or may not arise from the same facts, and the two convictions can stand together.

7. As to Lachek, the evidence of Morrison, with the other evidence, is sufficient to support the conviction for conspiracy.

P. B. C. Pepper, in reply: It is too narrow to say that an accomplice is one who is a party to an offence under s. 69. Unquestionably a person who could be indicted under s. 69 would be an accomplice, but many others, who could not be successfully

indicted, are also accomplices. Anyone with guilty knowledge and some measure of participation must be held to be an accomplice: *Rex v. Cratchley* (1913), 9 Cr. App. R. 232. It is ridiculous to suggest that Morrison might be an accomplice in the breaking and entering, but not in the conspiracy. The word "accomplice" relates to status, and status cannot be changed by the whim of Crown counsel in selecting the charge to be laid. I submit that it is not possible to contend reasonably that Morrison was not an accomplice.

The story of the flashlight, and the flashlight itself, cannot be corroboration because it is not *independent* evidence implicating the accused. It was only by Morrison's evidence that the flashlight was connected with Fraser: *Rex v. Yott* (1945), 85 C.C.C. 19, [1946] 1 D.L.R. 683.

The evidence of what Fraser said to Morrison in Kemp's presence was not brought within the rules that would make it admissible against Kemp. Even if it was properly admitted, however, the weight of this evidence must be minimal.

S. Paikin, in reply: Apart from the confession, there is not a tittle of admissible evidence linking Clark with the conspiracy, and I reiterate the submission that the confession should not have been admitted. Neither *Prosko v. The King*, *supra*, nor *Beatty v. The King*, *supra*, has any application here, since there was no question at all about a caution in the *Prosko* case, and in the *Beatty* case there was a proper caution, relating to the charge of murder, before the confession was signed. *Boudreau v. The King*, *supra*, is not an authority against the argument that a caution may in itself amount to an inducement in respect of other offences not referred to in it.

H. M. McMaster, in reply: As to the inadmissibility of Clark's confession as evidence against us, I refer to *Reg. v. Blake and Tye* (1844), 6 Q.B. 126 at 138, 115 E.R. 49.

Cur. adv. vult.

2nd November 1951. The judgment of the Court was delivered by

ROACH J.A.:—All four applicants were tried by His Honour Judge Forsyth in the County Court Judges' Criminal Court at the city of Toronto, on two counts contained in the one charge-sheet, as follows:

Count 1. That "at the City of Toronto, in the County of York, in the month of March in the year 1951, [they] unlawfully conspired together the one with the other and with others to commit the indictable offence of breaking and entering the office and shop of the Roselawn Farms Dairy situated at 1411 Dufferin Street in the said city and commit therein the indictable offence of theft, contrary to the Criminal Code".

Count 2. That at the city of Toronto aforesaid, "in the month of March, in the year 1951, [they] unlawfully attempted to break and enter the office and shop of the Roselawn Farms Dairy . . . with intent to commit the indictable offence of theft therein".

Following their trial on those two counts they were acquitted on count 2 and convicted on count 1. They were later sentenced to a term of six years on that conviction.

Immediately following that trial there was a further trial before His Honour Judge Forsyth on three counts contained in a second charge-sheet, as follows:

Count 1. All four appellants were charged that they "knowingly had in their possession or under their control explosive substances, namely, nitroglycerine and detonator caps under such circumstances as to give rise to a reasonable suspicion that they did not have such substances in their possession or under their control for a lawful object".

Count 2. The appellants Clark and Lachek were charged that at the city of Toronto, "in the month of March in the year 1951, [they] unlawfully carried in a vehicle under their control or of which they were occupants, two automatic pistols capable of being concealed upon the person, not having a permit in Form 76 to do so".

Count 3. The appellants Clark and Lachek were further charged that "in the month of March in the year 1951, [they] were found having in their possession by night, without lawful excuse instruments of housebreaking, vaultbreaking or safe-breaking". (Those instruments were specifically described in the charge and included nitroglycerine.)

After they had been arraigned on those charges and pleaded not guilty thereto, it was agreed that the evidence taken in the first trial should apply to the charges on which the accused were tried in the second trial. The accused were found guilty of the

offences charged against them respectively and on count 1 each of them was sentenced to a period of two years consecutive to the term imposed after the first trial, and on each of counts 2 and 3 Clark and Lachek were sentenced to a term of two years concurrent.

From their respective convictions following those two trials as aforesaid the appellants now appeal. They all also appeal against their respective sentences.

Having regard to arguments advanced by counsel for appellants on these appeals, it will be convenient if I first summarize the evidence, then refer to the learned trial judge's reasons given orally at the close of the trials, and then deal with those arguments. A summary of the evidence is as follows:

One who described herself as Rene Morrison was the key witness on the conspiracy charge. She is a woman of unsavoury reputation, with a criminal record. She is a married woman and apparently her married name is Rene Quinonas. She had come to Toronto early in March 1951 and had gone at once to live with the appellant Fraser as his wife in a rooming-house on Dundas Street, which was operated by one Zeigil as the proprietor thereof. She had become acquainted with Lachek and Kemp after coming to Toronto but she did not know Clark. She testified that on Thursday, 23rd March, while she and Fraser were in their living-quarters, Lachek arrived. Fraser at once remonstrated with Lachek because Lachek had not kept an earlier appointment and in reply Lachek said that he had something better, namely, a \$20,000 robbery, but he would not disclose the place until the night upon which it was to be carried out. Lachek inquired if Fraser was interested, and on Fraser saying that he was, the three of them repaired to a telephone in the building and Lachek telephoned a man by name Danny O'Connell, and said to O'Connell that "they had a good safe-cracker," and he introduced Fraser on the telephone. Fraser then spoke to O'Connell and said, "I can get the stuff if you supply the money." The witness Morrison did not speak on the telephone. Following that conversation Fraser and Lachek left together, and later Fraser returned alone. Fraser explained to her that the "stuff" was nitroglycerine. On Friday night following she went with Fraser to a moving-picture theatre, the purpose being that Fraser might have an alibi for the following Saturday night, that is, that

in the event of Fraser being required to provide an alibi for Saturday night, he could say that he had been at the theatre on Saturday night and would be able to describe the moving-picture programme. Fraser told her that he had got the "stuff", and it would be brought to the house on Saturday. On Saturday afternoon Fraser left the house and returned with the "stuff", which consisted of a bottle of nitroglycerine (Fraser told her it was nitroglycerine) wrapped in cotton batting, two detonator caps with wires protruding from them, and a bar of Fels-Naptha soap. In her curiosity she began to handle the bottle containing the nitroglycerine, and Fraser told her that it was highly explosive. Fraser proceeded to roll the soap into a ball.

On Saturday Fraser had also brought into the house "some drills" and they were placed in a drawer. It is obvious from the evidence that by "drills" the witness meant bits for an electric drill. At the trial a number of bits which, as will later appear, were recovered by the police early on Sunday morning, were shown to her and she said they resembled those she had seen in the drawer.

On Saturday evening the witness affixed a piece of cardboard over the lens of a flashlight belonging to Fraser, and in this cardboard there was a narrow slit so that only a narrow beam of light shone through. She identified the flashlight, which, as will later appear, was also recovered by the police early Sunday morning.

Early Saturday evening Fraser gave her some money to go to the show because he and the others were going to commit the robbery that night. She went to the show and on returning found a note which Fraser had left for her, saying that it would be all over by midnight and they would be back at that time. He said that a fourth man, whom he described only as "Joe", would be participating in the robbery.

It is clear from her evidence that at the time Fraser left on Saturday night she did not know the place which it was proposed should be broken and entered.

On her return from the show on Saturday night the witness waited up for Fraser. Another man was keeping her company but he is not identified in the evidence. Fraser did not return until about 4.30 Sunday morning, and he was then accompanied by the appellant Kemp. "They" said that Clark and Lachek had

been arrested at the dairy; that "they" had used Clark's car; that the car had been parked "down there", and they had the guns and paraphernalia in a suit-box which they put under an old parked car in a lane; that he—Fraser—had handed Kemp the bag with the nitroglycerine; that Lachek had stayed in the car as a look-out, and that Clark, Kemp and Fraser were starting up the lane when the police arrived; that they were just starting to take the "stuff" from under the car when they saw the police, and that they ran over a fence and the nitroglycerine was dropped beside a garbage-pail nearby.

According to the witness the other man, who had been keeping the witness company while waiting for Fraser to return, was present when the foregoing report was given by Fraser and Kemp. He was then dismissed and the witness and Fraser and Kemp sat around the apartment until about 6 or 6.30 o'clock Sunday morning, at which time they left and went to the neighbourhood of the Roselawn Dairy; there they looked under a car which was parked in a nearby lane, and glanced over where the garbage-pail was, but they did not see anything.

On cross-examination the witness said she did not know Danny O'Connell at the time of the telephone conversation but had met him later on one or more occasions when he came to her apartment after the appellants had been arrested.

Shortly after Fraser's arrest the witness wrote him certain letters, addressed to him at the gaol, in which she expressed her confidence in his innocence and amazement that it should be suggested that he was guilty of any wrongdoing. In her evidence she stated that these letters had been written at Fraser's suggestion, it being realized that before they were given into his hands they would be read by officials at the gaol. Fraser had been arrested on Monday morning, 26th March. Some time later Zeigil was arrested, and the witness understood that he too had been charged with conspiracy. The witness too was later apprehended and taken to police headquarters, where she gave a statement to the police. She was under the impression that she was charged with conspiracy at that time, but she was not detained. The charge against Zeigil was later dropped.

Not long after Fraser was arrested the witness commenced living with Zeigil and continued living with him thereafter up to and including the time of the trial.

Police Constables Linton and Boyle gave evidence, a summary of which is as follows:

On Saturday night and early Sunday morning they were in a police cruiser patrolling the area in the neighbourhood of the Roselawn Dairy. The Roselawn Dairy is on the east side of Dufferin Street. About 2 o'clock Sunday morning the officers observed a car travelling east on Chandos Street. They trailed it and observed that it stopped opposite a lane which runs south from Chandos Street and parallels Dufferin Street. Chandos Street runs west from Dufferin Street and enters Dufferin Street about 80 or 90 yards north of the Roselawn Dairy. They stopped some short distance behind it with their headlights out. They observed a man get out of the car from the driver's seat, reach down and pick up what looked to them to be a cardboard box, and carry it south into the lane. They lost track of him when he disappeared in the lane. They then drove the police cruiser up beside the parked car and they found Lachek crouched down in the front seat. He said he was waiting for a friend who had taken his girl home. On the back seat of that parked car the officers found a pair of women's nylon hose with the feet cut out and two pairs of gloves, one pair fitted inside the other. In the trunk of the car they found a blue metal box containing ratchets and fuses, electric bulbs and three small screw-drivers, an electric drill (Vandoran make, serial no. 362926) with a long extension-cord, and a pair of red rubber gloves. In the car also there were two rugs, one on the front seat and one on the rear.

The officers radioed for assistance. While they were waiting for assistance Clark appeared, not from the direction in which he had gone into the lane, but from the direction of Dufferin Street. In due course other police officers arrived and Clark and Lachek were taken into custody. A search was then made in the lane and under an old parked car the officers found a cardboard suit-box so placed in relation to the old car that the front of the box was just under the bumper of the car. There was wet snow on the ground at the time, but the box when found was perfectly dry. In the box they found bits for an electric drill wrapped in a brown paper bag, two crowbars, a ball of brown soap, two detonator caps wired, a centre-punch, screw-drivers and a mallet, a .38 automatic revolver, fully loaded, a 9-millimetre automatic revolver, also fully loaded, and a flashlight with card-

board with a slit cut in it attached over the lens. (This was the flashlight which had been identified by the witness Morrison.) Nearby they found a paper bag containing two 6-ounce bottles containing a liquid. The bottles were wrapped in cotton batting, and a coil of fine wire was extending through the batting. Professor Rogers gave evidence and identified the liquid as nitro-glycerine. The place in which the car was parked and at which the paper bag was found was estimated to be about 70 yards in a straight line from the Roselawn Dairy buildings.

Clark and Lachek were first taken to no. 7 police station in the city of Toronto, and then early Sunday morning they were transferred to the Toronto gaol.

On Sunday morning, shortly before noon, Detectives Smith and Sproule went to the Toronto gaol and brought Clark back to police headquarters, where he was interrogated and, after a warning to which I shall later refer, he made a statement, in substance as follows:

That on the previous day he had met a man at Dundas and Yonge Streets, Toronto; that they engaged in conversation during which he (Clark) said, "Let's look the town over". He told this man about the Roselawn Dairy having a lot of money, and the man said, "O.K. we'll knock it off." They arranged to meet that night, and they did meet about 8.30 o'clock. The man got into Clark's car and they drove up to the Roselawn Dairy and sat around and looked it over. They watched for the police making their rounds. They saw a police car, and, having satisfied themselves that it had temporarily left the neighbourhood, Clark and this man went back to get the "stuff"—and by "stuff" he said he meant the burglars' tools consisting of the nitro-glycerine, sledge-hammer, pinch-bars, detonator caps, the electric drill and the bits for it. He said these tools belonged to the other man. He did not identify the other man.

Kemp was not arrested until 13th April. After his arrest and after being cautioned he made a statement which was reduced to writing in which he said that he did not know anything about any plan to rob the Roselawn Dairy, but did admit that on 24th March 1951 he was with another fellow who bought an electric drill from the Ford machinery store at 169 King Street East, together with several bits for the drill; that the drill was taken away from the store in a brown paper envelope; that at the

time of the purchase there was a faulty extension-cord attached to the electric drill, but it was fixed before they took it away. That other man, according to the statement, was either Lachek or Clark. This is what Kemp said in his statement in that regard: "I was in the Edison Hotel on the Saturday afternoon and Paul Lachek came into the hotel and took me out to the car where I met a man whom I now know as Joseph Clark. We then went down and bought the drill." That statement having been typed, Kemp refused to sign it.

The proprietor of the Ford machinery store, one Dubiner, was called as a witness by the Crown, and stated that on Saturday morning, 24th March, he had sold the drill and the extension cord, which he identified, to a man whom he identified as Clark. There was another man with him, whom he failed to identify. On cross-examination, however, the witness said he was not certain that it was Clark.

Detective Smith gave evidence and stated that on Saturday, 24th March, which, curiously enough, was before Lachek and Clark were arrested, he had gone to Hamilton and searched the room occupied by Clark and in it he found a page torn from the Toronto city telephone directory. It was one of the pages of the classified ads and on that page were printed the names of a number of Toronto dairies.

The defence called one Danny O'Connell, who denied ever having held any telephone conversation with any of the accused relevant to the supply of nitroglycerine or any burglars' equipment. He admitted going to the premises occupied by Rene Morrison after the accused had been arrested. He said he went there to get information about Lachek.

So much for the evidence. I extract the following from the trial judge's reasons for convicting on the conspiracy charge:

"Rene Morrison is a woman with certainly a very colourful past. She probably to some extent was aiding and abetting Fraser, and in that respect she would be an accomplice. Whether she is an accomplice or not, I think her evidence must be scanned very carefully and must be put to a very strict test. However, her evidence seems to have been substantiated by other evidence that we have: no doubt about it, there was a carrying out of a common intention to commit a robbery on the Saturday night, and there certainly were many articles found in connection with

this proposed robbery, which substantiates much of her evidence. Her evidence seems to establish, in view of the fact that it stands uncontradicted, that there was a conspiracy, a common design to commit the robbery alleged.

"The statement given by Clark also is evidence also of a conspiracy to commit a robbery of the Roselawn Dairy. I think, therefore, the conspiracy to commit the robbery of the Roselawn Dairy has been established. I do not think the evidence of Rene Morrison can be discarded. She gives very logical reasons for what she has done and what she has said, and without any evidence, so far as I can see, to disprove what she said, I must accept it. I, therefore, consider that Fraser and Kemp are parties to this conspiracy.

"I think also that the two other accused, Clark and Lachek, are also parties to the conspiracy, as all the evidence given here would appear to indicate that they were carrying out the conspiracy of robbing this dairy."

The learned trial judge, in his reasons, had earlier stated that in his opinion the evidence in support of count 2 merely showed preparation for the commission of an offence, and did not amount to an attempt to commit it.

Then with respect to the counts contained in the second charge-sheet, the learned trial judge, at the conclusion of the trial on those counts, referred to what he had earlier said in convicting on the conspiracy charge, and found that the four appellants were bent on robbing the dairy, and that they had the articles in question for the purpose of doing so.

The arguments on behalf of the accused were several.

On behalf of the appellant Fraser it was argued that the only evidence against him was that of the witness Morrison; that she was an accomplice; that the trial judge treated as corroboration of her story evidence that in law did not amount to corroboration; that there was no corroboration and because there was none Fraser should have been acquitted; that the trial judge treated her evidence as though it stood uncontradicted when in fact it was contradicted in a material particular and because of (a) the fact that it was contradicted, (b) her notoriously bad character, and (c) the part she played, even if it did not make her an accomplice, the trial judge should not have convicted Fraser on her evidence alone.

Counsel founded his argument that Morrison was an accomplice on three pieces of evidence: first, she participated with Fraser in getting evidence that would support an alibi if later one should have been found necessary or convenient; second, she applied the cardboard to the flashlight lens; third, she went with Fraser and Kemp to inspect the area after Clark and Lachek had been arrested. In my opinion none of those acts made her an accomplice to the crime of conspiracy.

Who is an accomplice?

A person who could be convicted if indicted as a principal is certainly an accomplice: *Rex v. Dumont* (1921), 49 O.L.R. 222, 37 C.C.C. 166, 64 D.L.R. 128, and by virtue of s. 69 of The Criminal Code, R.S.C. 1927, c. 36, everyone is a party to and guilty of an offence who does or omits an act for the purpose of aiding any person to commit the offence or abets any person in the commission of the offence, or counsels or procures any person to commit the offence. A wider definition of an accomplice is given by Chisholm J. in *Rex v. Morrison* (1917), 51 N.S.R. 253 at 270, 29 C.C.C. 6, 38 D.L.R. 568, as follows: "An accomplice is one who is concerned with another or others in committing or attempting to commit any criminal offence."

The crime of conspiracy, for the purpose of the instant case, consists in the agreement between two or more persons to do an illegal thing. It has been said, times without number, that the gist of conspiracy is the agreement. When it is remembered that agreement is the gist of the offence it becomes clear that none of those things on which counsel relied could stamp Morrison as an accomplice to the agreement by Fraser to commit any indictable offence. The preparation for the alibi, the fixing of the flashlight, the inspection of the area, had nothing whatsoever to do with Fraser agreeing to break and enter any premises. The agreement was complete before any of those things were done. They were subsequent to and consequent upon the earlier agreement. They did not assist in bringing about the agreement. No matter in what other crime she was or might have been an accomplice, I am satisfied she was not an accomplice to the conspiracy. She was a witness to it but not a party to it.

Because of the notoriously bad character of the witness Morrison and the part she played in the events—even though she was not an accomplice—her evidence should be given very

close scrutiny and weighed with the utmost care. Judicial prudence required that degree of care. Clearly the learned trial judge appreciated that duty when he said that "her evidence must be scanned very carefully and must be put to a very strict test". In the process of testing it he said first that her evidence was substantiated by other evidence, and, second, that it was uncontradicted. Counsel seized on those two statements and argued that both were wrong.

Unquestionably that part of her evidence in which she said that Lachek and Fraser had a telephone conversation with Danny O'Connell was contradicted. The trial judge could not so soon have forgotten that contradiction. That such a telephone conversation had taken place between Lachek and Fraser and any other person could have been contradicted by Fraser and Lachek, and I think that it was to the absence of any contradiction by them that the trial judge had reference when he made that second statement. The witness Morrison could have been right when she related the story of a telephone conversation and its substance and wrong when she said the person to whom they telephoned was O'Connell. She did not know O'Connell at that time. Neither did Fraser. Lachek did. Indeed their acquaintance was more than casual, as is evidenced by the fact that shortly after Lachek's arrest O'Connell came to the place where Morrison was living to get information about his arrest. It is entirely possible that after Morrison met O'Connell, and as a result of the interest he was then showing in Lachek, she got the impression that O'Connell was the person to whom Lachek had telephoned and introduced Fraser.

In testing Morrison's credibility there are some circumstances that in my opinion tend to mark her story as credible. They amount to something less than legal corroboration of her story, but they nevertheless assist in weighing the truth of the story she told.

Why, for example, would she admit, if it were not true, that she had fashioned the cardboard shield and affixed it to the flashlight? That was self-condemning evidence. Her evidence of what had been planned to be done fits in with the pattern of subsequent events. Lachek was one of the conspirators; he was found at the scene of the intended crime. Nitroglycerine was to be used and she described a bottle swathed in cotton batting; detonator caps such as she described were also found; her evi-

dence of how the intended crime was frustrated fits in with evidence of the police. She could only get that description of the frustration from Fraser and Kemp or from the police, and there is no suggestion that the police told her.

I think the trial judge was right in accepting her story notwithstanding her bad character and the part that she played. Fraser was properly convicted of the conspiracy.

Once the evidence of the witness Morrison is found worthy of credit it follows that the conviction of Kemp was also proper. When he and Fraser returned to Fraser's apartment early Sunday morning, although Fraser did most of the talking in describing what had happened, Kemp by his comparative silence in the circumstances must be taken to have agreed with Fraser's description of events. The witness Morrison said that Kemp was very nervous at that time and said little, but what little he did say was not a denial of Fraser's story. In addition to her evidence against Kemp there is the further evidence contained in his statement to the police, the substance of which I have already recorded.

As to the conviction of Lachek on the conspiracy charge, I agree with his counsel that the statements given by Kemp and Clark are not admissible against him to prove the conspiracy. Those statements were not made in furtherance of the common object of the conspiracy. Once the agreement, which is the essence of the conspiracy, is established, the acts of each conspirator in furtherance of the common object are regarded as being done on behalf of all. Those acts, however, must be acts in furtherance of the common design, *i.e.*, part of the *res gestae*, in the execution of the conspiracy. An act done or a statement made by one of the conspirators after the common object has been effected or has been frustrated is not admissible in evidence against the others: *Reg. v. Blake and Tye* (1844), 6 Q.B. 126 at 138, 115 E.R. 49: For the same reason the conversation between Fraser and Kemp and Morrison early Sunday morning was not evidence against Lachek or Clark. But there was ample evidence against him without those statements to justify a finding that he was one of the conspirators.

On behalf of Lachek a further argument was advanced relevant to his conviction on the conspiracy charge. It was this, that even if it should be found that Lachek entered into a con-

spiracy with the others to break and enter some building and commit theft therein, there was no admissible evidence against him that the particular place contemplated was the Roselawn Dairy. There are other commercial premises near that dairy and it was argued that some one of them may have been the objective of the conspiracy. That argument is too thin to bear any weight. Whatever place Fraser, Kemp and Clark had in mind as their objective, Lachek had the same place in mind as his objective. Certainly he was not aiming at one place and they at another. There was only one conspiracy and one objective. Once it is established that Lachek was a party to a conspiracy, then it follows that whatever place was the objective of Fraser, Kemp and Clark was also Lachek's objective.

As to the conviction of Clark on the conspiracy charge there is first of all his statement given to the police. Counsel for Clark argued that the statement was not admissible in evidence against him on that count because the caution which was given him was insufficient for that purpose. He had been warned that he was arrested on a charge of possessing burglars' tools and his counsel argued that the statement was admissible in evidence on a trial of that charge only. In support of that argument he cited the judgment of this Court in *Rex v. Dick*, [1947] O.R. 105, 87 C.C.C. 101, 2 C.R. 417, [1947] 2 D.L.R. 213. That case does not support the argument. There the accused had been arrested and charged with vagrancy. Among the several statements given by the accused were some given by her after she had been cautioned that she was charged with vagrancy. When she was later charged with murder the Crown introduced those statements in evidence against her on that charge. On appeal against her conviction, it was held by this Court, per my Lord the Chief Justice, that, *inter alia*, the statements given by the accused after that caution were not admissible in evidence on the murder charge. At pp. 123-4 the Chief Justice said:

"If the caution is to amount to any thing more than the idle recitation of a form of words, without regard to their true import, then it seems to me that it cannot fairly be regarded as a caution such as is proper to be given to establish the voluntary character of a statement of the accused on her trial for murder, when she is asked whether she has anything to say in answer to a charge of vagrancy. It is in relation to that charge,

and to that charge only, that the person questioned is cautioned that whatever he may say may be used in evidence. Whatever uses may otherwise be made of a statement made after such a caution and no other, it cannot, in my opinion, be admitted as a voluntary statement on the trial of the accused person for an entirely different offence, merely on proof of a caution such as was given here. It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offence, upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid and made the subject of a caution, but in relation to a more serious and altogether different offence."

That language cannot be applied to the instant case. The charge of possession of burglars' tools was no trivial charge. It was intended to proceed on that charge. The possession of burglars' tools was relevant to the conspiracy charge. Possession of those tools constituted an overt act which helped to establish the earlier conspiracy. The two cases are clearly distinguishable.

It was also argued that Clark's statement was also inadmissible against him because the gaoler had no authority to deliver Clark into the possession of the detectives on Sunday morning. Whether he did or did not have such authority did not affect the voluntary character of the statement.

Apart from Clark's confession there was ample evidence justifying his conviction on the conspiracy count.

On behalf of Clark and Lachek it was argued that they should not have been convicted on count 1 and also on count 3 on the second trial, that to do so was to convict them twice for the same offence. In support of that argument their counsel relied on the judgment in *Rex v. Quon*, [1947] O.R. 856, 90 C.C.C. 28, 4 C.R. 385, [1948] 1 D.L.R. 710, and on an appeal to the Supreme Court, [1948] S.C.R. 508, 92 C.C.C. 1, 6 C.R. 160, [1949] 1 D.L.R. 135. The judgment in that case does not support the argument. The facts in that case were as follows: The accused, while armed with a revolver, robbed one Sam Lun. Having been charged with that offence he pleaded guilty. He was also charged with and after a trial found guilty of the offence of having on his person a revolver contrary to s. 122 of The Criminal Code.

This Court quashed that conviction and an appeal by the Attorney-General to the Supreme Court of Canada was dismissed.

Section 122, as re-enacted by 1938, c. 44, s. 7, read as follows:

"Every one who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed upon the person while committing any criminal offence is guilty of an offence against this section and liable to imprisonment for a term not less than two years in addition to any penalty to which he may be sentenced for the first mentioned offence, and an offence against this section shall be punishable either on indictment or summary conviction in the same manner as the first mentioned offence.

"(2) Such imprisonment shall be served after undergoing any term of imprisonment to which such person may be sentenced for the first mentioned offence."

The *ratio* of the decision in the *Quon* case, both in this Court and in the Supreme Court of Canada is that on a proper interpretation of the words "any criminal offence" as they appeared in s. 122, those words had a restricted meaning and did not include an offence of which an essential element was the possession of a firearm capable of being concealed upon the person. To give those words their ordinary exhaustive meaning would result in repugnancy to and inconsistencies with other sections of the Code.

Kellock J., pointed out in his reasons at p. 520: "It is obvious of course that Parliament may, if it sees fit, constitute two separate offences out of the same act or omission or make part of an act or omission or one or more of a series of acts or omissions a separate offence additional to that constituted by the complete act or omission or the whole series."

Here I think it is clear that Parliament did create two separate offences out of the same act. There is no repugnancy or inconsistency between s. 464, which creates the offence of possessing burglars' tools, and s. 114, which creates the offence of possessing explosives. An accused who is found in possession of burglars' tools, including explosive substances, may be properly convicted under s. 464 and also convicted under s. 114.

I would therefore dismiss all the appeals against conviction.

As to the sentences—both Fraser and Kemp have long criminal records. Fraser's record dates back to December 1920

when at Edmonton, Alberta, he was convicted of robbery. Between then and February 1949 he was convicted 15 times. The record does not show the penalties imposed on those convictions, but they were for theft, receiving, false pretences, breaking and entering (3), and his last previous conviction was for possession of safebreaking tools and theft. Kemp's record commences in June 1930 and the last offence of which he was convicted was in February 1949. Between those dates he was convicted 8 times for offences including breaking and entering and theft (3), theft, and the last conviction was for possession of safebreaking tools and theft. It is fair to describe both Fraser and Kemp as professional burglars. Lachek's record is not as long. Between February 1943 and March 1950 he had 5 convictions recorded against him, three for theft, one for possession of an unregistered pistol and the fifth for receiving. Clark had a shorter record. It began in March 1947 and from then until December 1949 he suffered 4 convictions, one for shopbreaking, another for possession of a pistol and two for receiving. Subsequent to his conviction in the instant case he was also convicted of two offences of breaking and entering another dairy, one on 4th February, the other on 11th February 1951.

In my opinion each of these appellants is a menace to society. Earlier punishment imposed on them had no corrective effect. They apparently made up their minds to live a life of crime. The trial judge made no error in principle in imposing the sentences. I would not interfere and I would not allow the time served pending these appeals to apply on the sentences imposed.

All appeals dismissed.

Solicitors for the accused Clark, appellant: White & Paikin, Hamilton.

Solicitors for the accused Lachek, appellant: Bogart & McMaster, Toronto.

Solicitors for the accused Fraser and Kemp, appellants: Bolsby & Pepper, Toronto.

[COURT OF APPEAL.]

Re LeSieur.

Appeals — Right of Appeal — Order of Judge in Chambers — Matter not of Practice or Procedure — No Right of Appeal Created by Special Statute — The Judicature Act, R.S.O. 1950, c. 190, ss. 11(1), 26 — Rule 1 — The Judges' Orders Enforcement Act, R.S.O. 1950, c. 189 — The Adoption Act, R.S.O. 1950, c. 7.

There is no right of appeal from the order of a judge of the Supreme Court in chambers dismissing an application for adoption. The Adoption Act itself, under which the application is made, creates no right of appeal. The order is made in chambers rather than in court, and is therefore not within s. 26(1)(a) of The Judicature Act, and it does not deal with a matter of practice or procedure, and is therefore not within s. 26(1)(b). Nor has s. 11(1) of The Judicature Act the effect of preserving the general right of appeal from an order of a judge in chambers created by former Rules. The judge hearing an application under s. 9 of The Adoption Act does so as a judge of the Supreme Court and not as *persona designata*, and The Judges' Orders Enforcement Act is consequently inapplicable to confer a right of appeal.

AN APPEAL from the order of Ferguson J., [1951] O.W.N. 186, [1951] 2 D.L.R. 775, dismissing an application for an adoption order.

6th April and 15th June 1951. The appeal was heard by ROACH, HOGG and BOWLBY JJ.A.

(Although the appeal was argued on the merits, the argument is noted only in so far as it relates to a preliminary objection taken by counsel for the respondents.)

Arthur Maloney, for the respondents: There is no right of appeal in the circumstances of this case, and the order of Ferguson J. giving leave to appeal was made without jurisdiction.

The Adoption Act, R.S.O. 1950, c. 7, does not give a right of appeal and therefore the right, if it exists, must be found either under The Judicature Act, R.S.O. 1950, c. 190, or under The Judges' Orders Enforcement Act, R.S.O. 1950, c. 189.

The Judges' Orders Enforcement Act applies only where a judge acts as *persona designata*, and Ferguson J. was not so acting. Under s. 15 of The Adoption Act jurisdiction is given to the Supreme Court, not to a judge. In all the authorities I have found where it was held that a judge had acted as *persona designata* (e.g., *Re Hynes and Schwartz*, [1937] O.R. 924, [1938] 1 D.L.R. 29) the statute referred to "a judge of the County Court" or "a judge of the Supreme Court"; I do not believe it has ever been held that a judge was *persona designata* when exercising jurisdiction conferred by statute on the Supreme Court. A County Court Judge hearing an application under The Adoption Act would do so as *persona designata*, because a par-

ticular judge is designated in the Act. This point has been argued in two cases, but not decided in either of them: *Cullen v. Kemp*, 28 O.W.N. 324, [1925] 4 D.L.R. 579; *Re Shelly and Purdy* (1924), 27 O.W.N. 144.

Section 26 of The Judicature Act does not give a right of appeal. Under subs. 1 there is a right of appeal from any judgment or order made in court, but from a judgment or order made in chambers only if it relates to practice or procedure. This order was made in chambers (which is the proper forum under s. 15(3) of The Adoption Act) and it does not deal with practice or procedure.

G. W. Mason, K.C. (T. R. Deacon, K.C., with him), for the respondents: It is stated in *Re Waterman et al. and Building Enterprise Ltd. et al.*, [1936] O.R. 47 at 50, [1936] 1 D.L.R. 117, that it is not intended by the Legislature that jurisdiction should be conferred upon any judge without a right of appeal.

No inference is to be drawn from the reference in s. 15 of The Adoption Act to "the Supreme Court" and to "the judge . . . of the county or district court". This is merely a convenient way of designating the judges of the Supreme Court; it cannot mean that the jurisdiction is vested in the whole Court. *Re Hynes and Schwartz, supra*, is strong authority for holding wherever possible that a right of appeal exists. The judge below was exercising a special statutory jurisdiction. I submit therefore that, having obtained leave to appeal, we are entitled to appeal under The Judges' Orders Enforcement Act.

I submit further that we come within s. 26(1)(b) of The Judicature Act, since the order of Ferguson J. deals with a matter of practice and procedure, in that he determined whether or not to dispense with the parents' consent, as permitted by The Adoption Act, and also decided what was the effect of the delay of the County Court Judge in the previous application. There can be no doubt that the order affects the ultimate rights of the parties concerned.

I rely also on s. 11(1) of The Judicature Act. When The Judicature Act, 1913 (Ont.), c. 19, came into force there was in existence a Rule, C.R. 777, as replaced in 1908, giving a right to appeal to a Divisional Court of the High Court from an order of a judge in chambers, without limitation as to the subject-matter of the order, and s. 11(1), first enacted as s. 12 of the 1913 Act, expressly preserved the jurisdiction of the Divisional Courts and

gave it to the Court of Appeal. Rule 507 of the 1913 Rules of Practice and Procedure also gave a right to appeal without leave from an order or judgment of a judge in chambers which finally disposed of the whole or part of the action or matter.

Arthur Maloney, in reply: Where an application *may* be made in chambers it *should* be made there: Holmested & Langton's Ontario Judicature Act, 5th ed. 1940, p. 825. In any event this motion was made in chambers, and not in court.

The matter is not one of practice and procedure, but is a substantive one, involving the rights of the parties.

Section 11(1) of The Judicature Act cannot be invoked, since s. 26 must be considered exhaustive of the right of appeal.

Cur. adv. vult.

12th November 1951. ROACH J.A.:—The appellants Palmer Gibeau and his wife Dorothy May Gibeau applied for an order under The Adoption Act, now R.S.O. 1950, c. 7, for the adoption by them of the above-named infant. The application was opposed by the parents of the child, and they are the respondents herein.

That application was heard by Ferguson J., who dismissed it without costs: [1951] O.W.N. 186. The appellants then applied to Ferguson J. for an order granting them leave to appeal to this Court. That application was granted and then this appeal was launched.

On the argument in this Court Mr. Maloney raised the preliminary objection that there is no right of appeal to this Court and that Ferguson J. had no jurisdiction to grant leave to appeal.

We reserved judgment on the preliminary objection and heard the appeal on its merits.

I am now of the opinion that the preliminary objection must prevail.

The Adoption Act gives no right of appeal. Therefore, if there is such a right it must be by virtue of provisions contained in either The Judicature Act, R.S.O. 1950, c. 190, The Rules of Practice and Procedure, or The Judges' Orders Enforcement Act, R.S.O. 1950, c. 189.

Section 26 of The Judicature Act provides as follows:

“(1) Subject to sections 24 and 25 [which have no application here] and to the rules regulating the terms and conditions on

which appeals may be brought, an appeal shall lie to the Court of Appeal from,

“(a) any judgment, order or decision of a judge of the High Court in court, whether at the trial or otherwise;

“(b) any judgment, order or decision of a judge in chambers in regard to a matter of practice or procedure which affects the ultimate rights of any party, and subject to the rules from any other judgment, order or decision of a judge in chambers in regard to a matter of practice or procedure.

“(2) The Court of Appeal shall also have jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature.

“(3) The Court of Appeal shall also have jurisdiction to hear and determine applications for new trials and applications to set aside verdicts and findings of juries in actions and matters tried or heard in the High Court.

“(4) Nothing in this section shall limit the generality of subsection 1 of section 11.”

The application for the adoption order was heard by Ferguson J. in chambers, that being the proper forum as provided by s. 9(3) (now s. 15(3)) of The Adoption Act. Therefore, the specific right of appeal conferred by s. 26(1) (a) of The Judicature Act has no application here.

Mr. Mason contended that s. 26(1) (b) gave a right of appeal in this matter. In order to understand his argument it is necessary to state the *ratio* of Mr. Justice Ferguson's decision.

The infant was born out of wedlock on 29th January 1947. On 27th March 1947 the mother signed a consent to an order of adoption under The Adoption Act, and forthwith the child was placed with the appellants and has continued in their custody since that date. On 26th August 1947 the mother and the father of the child were married and at once, by virtue of The Legitimation Act, R.S.O. 1937, c. 216, now R.S.O. 1950, c. 203, the child became legitimate and was thereafter in the custody of the appellants for adoption without the consent of the father. Following the decision of the Supreme Court of Canada in *Re Baby Duffell; Martin et al. v. Duffell*, [1950] S.C.R. 737, [1950] 4 D.L.R. 1, Ferguson J. held that the consent of the parent must exist at the time the adoption order is made.

Section 7 of The Adoption Act provides that: “The court may dispense with any consent required . . . if, having regard to

all the circumstances of the case, the court is of opinion that the consent may properly be dispensed with." Ferguson J., although urged to do so, refused to dispense with the consent of the natural parents.

Mr. Mason argued that Ferguson J.'s refusal to dispense with the consent involved only a matter of practice or procedure within s. 26(1) (b) of The Judicature Act. I do not agree. Before the Court can dispense with the consent it must be satisfied that the circumstances of the case justify it. In other words, there must first be an adjudication by the Court on all the circumstances. Such an adjudication involves substantive rights and not a mere question of practice or procedure.

As earlier pointed out, there is no right of appeal given by The Adoption Act. Hence, subs. 2 of s. 26 of The Judicature Act has no application, and obviously neither has subs. 3.

Mr. Mason next argued that a right of appeal is conferred by s. 11(1) of The Judicature Act. That subsection is as follows:

"The Court of Appeal shall exercise that part of the jurisdiction vested in the Supreme Court which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by the Court of Appeal, and in the name of the Supreme Court."

The present s. 11(1) first appeared as s. 12 of The Judicature Act, 1913 (Ont.), c. 19, which replaced The Judicature Act, R.S.O. 1897, c. 51. One effect of the 1913 Act was to abolish Divisional Courts of the High Court.

Section 75 of The Judicature Act, 1897, specified cases in which an appeal lay to a Divisional Court of the High Court. It will suffice to say that those cases did not include the case of a judgment or order of a judge of the High Court in chambers.

However, there was a Rule of Practice in effect at the time when The Judicature Act, 1913, was enacted that did authorize an appeal from a judge in chambers to a Divisional Court of the High Court. That Rule was C.R. 777, as reworded by C.R. 1278, passed on 27th March 1908 (15 O.L.R. 665), and was in part as follows:

"(1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of an action may appeal therefrom to a Divisional Court without leave, by notice of motion to be served within four days, and made returnable

within seven days after the order or judgment has been pronounced. The motion shall be set down at least one day before the same is made returnable."

That Rule and all the Rules of Practice then in effect had, by virtue of s. 122 of The Judicature Act, 1897, the same force and effect as if it and they had been expressly enacted by the Legislature.

There is presently no Rule authorizing an appeal to the Court of Appeal from the judgment, order or decision of a judge in chambers except in the case of an interlocutory order.

Mr. Mason's argument, therefore, is this, that notwithstanding that neither in The Judicature Act nor in the Rules of Practice is there a specific provision creating a right of appeal to the Court of Appeal from the judgment, order or decision of a judge in chambers, save on a matter of procedure (s. 26(1)(b)) and in the case of an interlocutory order (Rules 491-493), s. 11(1) of the Act has preserved the old right of appeal and merely substituted the Court of Appeal for a Divisional Court of the High Court as the tribunal to hear the appeal.

A right of appeal must be given by express enactment (this would include an appeal authorized by the Rules); it does not exist in the nature of things: *Re The Sandback Charity Trustees and The North Staffordshire Railway Company* (1877), 3 Q.B.D. 1.

The present Rule 1 specifically states that all Rules and orders heretofore passed are rescinded, except those mentioned in the schedule to the present Rules.

Mr. Mason's argument must therefore amount to this, that, notwithstanding that the old Rule 777 has been rescinded, the right of appeal which it originally authorized still persists, with the Court of Appeal substituted for a Divisional Court of the High Court. I do not agree.

In my opinion, the present s. 11(1) must be construed as meaning no more than this, namely, that where a right of appeal, which would otherwise be frustrated because the Divisional Courts of the High Court have been abolished, still exists, the Court of Appeal is authorized to hear and dispose of the appeal. The language used in s. 26(4) of The Judicature Act supports that construction. The "generality" of s. 11(1) must yield to the particular, and the particular is found in the present specific provisions of the statute and of the present Rules relating to

appeals to the Court of Appeal. It follows that there is no right of appeal to the Court of Appeal from the judgment in question under either The Judicature Act or the Rules.

Then, has The Judges' Orders Enforcement Act any application?

A brief examination of The Adoption Act makes it abundantly clear that a judge of the Supreme Court hearing an application for adoption under that Act is not acting as *persona designata* but is acting for, and as a member of, the Court and thereby exercising the authority vested in him by his patent as a judge of the Supreme Court. Section 15(1) of The Adoption Act provides, in part, that: "The court having jurisdiction to make an adoption order shall be the Supreme Court." The decision of Ferguson J. is therefore the decision of the Court and not the decision of a person designated by the Legislature to hear and dispose of the application.

Regretfully I conclude that the preliminary objection raised by Mr. Maloney must prevail. I say regretfully because it seems to me that a matter such as this is quite sufficiently important to justify an appeal to the Court of Appeal.

I would therefore quash this appeal, but, in the circumstances, without costs.

HOGG J.A.:—I am entirely in agreement with the disposition of this appeal made by my brother Roach, but would like to add a few words with reference to the matter.

I think it is unfortunate that it has not been possible on the hearing of this appeal to deal with it on the merits, and to consider the questions presented by the judgment from which the appeal is taken, namely, whether or not the doctrine of public policy could properly be invoked, and whether or not the peculiar facts and circumstances with which the matter is surrounded bring it within the exception as to consent set out in s. 7 of The Adoption Act as interpreted by the judgment of Mr. Justice Cartwright in the Supreme Court of Canada in *In re Baby Duffell; Martin et al. v. Duffell*, [1950] S.C.R. 737, [1950] 4 D.L.R. 1.

BOWLBY J.A. agrees with ROACH J.A.

Appeal quashed without costs.

Solicitors for the appellants: Deacon & Benevides, Toronto.

Solicitors for the respondents: James A. Maloney, Renfrew.

[COURT OF APPEAL.]

Slaughter v. Taylor et al.

Taxation—Tax Sale Proceedings—Validity—Deed Executed and Delivered within One Year of Sale—Curative Provisions—The Assessment Act, R.S.O. 1950, c. 24, ss. 156(1), 157(1), 181, 182—Effect of Tax Sale as Interrupting Acquisition of Possessory Title.

It is not a valid objection to a tax deed that it was executed and delivered on the anniversary date, exactly one year after the sale, and thus before the expiration of the time allowed by statute for redemption, particularly if the sale and the tax deed have not been questioned before any competent Court within two years after the sale. *Heron et al. v. Lalonde et al.* (1916), 53 S.C.R. 503, is not an authority to the contrary binding in Ontario, because of the difference in wording in the relevant statutes, and in particular the provisions of s. 182 of The Assessment Act.

Real Property—Title by Possession—Interruption of Period—Tax Sale Proceedings.

It is well settled that a tax sale interrupts the acquisition of a possessory title and creates a fresh starting-point. *Smith v. The Midland Railway Company* (1883), 4 O.R. 494; *Soper v. City of Windsor* (1914), 32 O.L.R. 352; *Re Hunt and Bell* (1915), 34 O.L.R. 256, referred to.

AN APPEAL by the plaintiff from the judgment of Spence J., dismissing the action, which was for a declaration of ownership of lands, and for other relief.

8th May 1951. The appeal was heard by ROACH, HOPE and MACKAY JJ.A.

E. M. Shortt, for the plaintiff, appellant: The facts are not in dispute, and the principal question is as to the validity of the tax deed, which was executed on the anniversary date of the tax sale.

The trial judge gave three reasons for his decision, each of which gives rise to difficulties. His first reason is that the plaintiff has not proved ownership, in that the description is not affixed to the actual lots in question. With respect, I do not understand the meaning of this. [HOPE J.A.: Does it not mean that the description does not correspond to the land in question?] Once a paper title is shown, then the man who claims a possessory title adverse to that title has the onus of establishing his title. [ROACH J.A.: If a conveyance is registered, then that constitutes notice to the world. Here the plaintiff found this man in possession, and that put the plaintiff on his guard.] The notice must be unequivocal. No notice of the sale was given to the defendants, and none is required under The Assessment Act, R.S.O. 1937, c. 272. The trial judge misdirected himself as to both the law and the facts.

As to the trial judge's second reason, this block of land did exist. The tax deed, by s. 14 of The Assessment Act, cannot affect the right of way.

As to the third reason, the wording of s. 177 of The Assessment Act indicates that this deed was validly given. The trial judge relied on, and followed, *Heron et al. v. Lalonde et al.* (1916), 53 S.C.R. 503, 31 D.L.R. 151, 10 W.W.R. 1241, but I submit that that decision is inapplicable because of the differences between the statutory enactments applicable in the two cases. Our Act differs from the British Columbia statute in that it provides for a presumption of regularity, not of "all proceedings leading up to the execution of the deed" but of "any proceedings subsequent thereto" (i.e., subsequent to the imposing or levying of the tax). Sections 185 and 186 of our Act are curative sections and are conclusive in our favour. We are surely in a better position than was the case in *Langdon v. Holtvrex Gold Mines et al.*, [1937] S.C.R. 334, [1937] 2 D.L.R. 364. The Tax Sales Confirmation Act, 1940 (Ont.), c. 31, is also important.

The Legislature of Ontario has in effect overruled the decision in *Heron et al. v. Lalonde et al.*, *supra*, and it is therefore unnecessary to seek authority in decided cases. The obvious purpose of the Act is, after two years have passed and the person aggrieved has taken no action, to confirm the sale. It is not even absolutely essential that a one-year period should elapse before a tax deed is given.

The equities are in our favour. The defendant's contention is in effect that our good paper title should be invalidated in favour of a man who, although he now claims that he has been owner for thirty years, never registered any claim or paid any taxes on the 5 feet in question.

W. A. Donohue, for the defendant, respondent: The attack we have made on the tax sale deed is only incidental. The plaintiff seeks a declaration that he is the owner of 44 feet 10 inches of this lot, and entitled to possession thereof, and we set up The Limitations Act, R.S.O. 1937, c. 118. As to the equities, we had a fence, which stood from 1920 to 1949, and the plaintiff admits that he saw this disputed strip enclosed by our fence. What is to be said of the position of a man who inspects property, sees fences, and later finds that the description in his

deed gives him more land than he had thought, and seeks to recover it?

The effect of *Heron et al. v. Lalonde et al.*, *supra*, must be that where, as here, the tax sale takes place on 20th September and a tax deed is executed on 20th September of the following year, the deed is a nullity. The curative sections cannot cure a nullity, and s. 177 is clear as to the period allowed for redemption. I rely on *Proudfoot v. Bush* (1862), 12 U.C.C.P. 52, and *McLean Gold Mines Ltd. v. Attorney-General for Ontario*, 58 O.L.R. 64, [1926] 1 D.L.R. 11. Sections 185 and 186 must be carefully considered; s. 186, for example, does not mention delivery, and here there was delivery, so that takes the case out of the section.

E. M. Shortt, in reply: The *McLean Gold Mines* case, *supra*, was reversed *sub nom. Attorney-General for Ontario et al. v. McLean Gold Mines, Limited*, [1927] A.C. 185, [1926] 4 D.L.R. 213, [1926] 3 W.W.R. 193.

The defendant cannot assert a possessory title, because a tax sale interrupts the running of the time, and time must start to run again after the sale: *Smith v. The Midland Railway Company* (1883), 4 O.R. 494; *Soper v. City of Windsor* (1914), 32 O.L.R. 256, 24 D.L.R. 590.

Cur. adv. vult.

23rd October 1951. The judgment of the Court was delivered by

HOPE J.A.:—This is an appeal by the plaintiff from the judgment of Spence J., dated the 28th November 1950, after a trial without a jury at Sarnia, whereby the plaintiff's action was dismissed with costs, and the defendant's counterclaim was dismissed without costs. There is no cross-appeal.

The plaintiff by his pleadings claimed:

“(a) A declaration that he [the plaintiff] is entitled to possession of the Northerly 44 feet 6 inches of Lot Number 24 on the West side of Shamrock Street according to Registered Plan Number 25 for the City of Sarnia, subject to a right-of-way in favour only of the Defendants over the Southerly 5 feet of the said lands.

“(b) An injunction restraining the Defendants from interfering with the Plaintiff's lawful use of the said lands.

“(c) \$500.00 damages for interference with the rights of the Plaintiff.”

The essential facts, which are not in dispute, are briefly as follows:

The plaintiff claims to be the purchaser under an agreement of sale dated 19th November 1946 from one Reva Jack, of the northerly 44 feet 10 inches of lot 24 on the west side of Shamrock Street in the city of Sarnia according to registered plan no. 25, subject to a right of way over the southerly 5 feet thereof. The plaintiff made the payments due under his agreement of purchase and entered into possession of this property, save as to part of the southerly 5 feet thereof.

The said Reva Jack, the vendor, acquired title to the said lands by a conveyance dated the 11th June 1946 and registered the 1st August 1946, from the Corporation of the City of Sarnia to the said Reva Jack. The City of Sarnia, in turn, had acquired title to the property by virtue of a tax deed dated the 20th December 1939 and registered the 7th February 1940, from the mayor and treasurer of the said City to the Corporation of the City of Sarnia. The said tax deed contained no mention, however, of the right of way previously referred to. The grant from the Corporation of the City of Sarnia to Reva Jack, however, was subject to the right of way in question.

By a conveyance dated 21st April 1920 and registered 26th April 1920 the defendants acquired title to the southerly 35 feet of lot 24 aforesaid, together with a right of way over the northerly 5 feet of the southerly 40 feet of the same lot; that is, the right of way was over the 5-foot strip lying immediately to the north of the southerly 35 feet of the lot.

The defendants in their statement of defence allege that by virtue of a memorandum of agreement dated the 26th October 1921 they “purchased the northerly five feet of the southerly forty feet of said lot number twenty-four from one James W. Campbell”, who was at that particular time the registered owner of the lands of the plaintiff. This agreement does not appear to have been registered and is not disclosed by an examination of the Registrar’s abstract filed as ex. 3. What purports to be the original of this last-mentioned agreement, although bearing date the 5th October 1921, was filed as an exhibit at the trial. This agreement, however, does not purport to deal with the fee

in the northerly 5 feet of the southerly 40 feet of lot 24, but only with "the right of way" over the same.

The defendants allege that in or about the month of October 1921 they, the defendants, "erected a boundary fence along the complete northern extremity of their lands as described in paragraph 2" of their statement of defence. There was no evidence adduced which would indicate conclusively whether this fence was along the northerly boundary of the southerly 35 feet of the lot or of the southerly 40 feet thereof. Presumably it was the latter, since the defendants claim to have enclosed the 5-foot strip in question.

The defendants further claim that since the erection of the fence in 1921 they have been in open, continuous, quiet and undisturbed possession and that their lands were continuously and wholly enclosed by the fence, and that no one has in any way challenged their right to possession until June 1949, when the plaintiff entered upon the lands and removed a portion of the fence which had been erected as previously mentioned. The difficulties ensuing culminated in the present action.

The trial judge dismissed the action on the three following grounds, namely:

(1) that the plaintiff failed to prove title to any lots;

(2) that the tax deed upon which the plaintiff founds his title defines the lots purporting to be conveyed as the north 44 feet 10 inches of lot 24 on the west side of Shamrock Street, and that "no such block exists as a block held by a former owner whose land has been sold for taxes"; and

(3) that the tax deed is bad since it was made on the 20th December 1939, based on a sale which was on the 20th December 1938, and was therefore a nullity, applying the principle laid down by the Supreme Court of Canada in *Heron et al. v. Lalonde et al.* (1916), 53 S.C.R. 503, 31 D.L.R. 151, 10 W.W.R. 1241.

After repeatedly reading and considering the evidence, and with the greatest respect for the trial judge, I am at a loss to appreciate his first reason for dismissing the plaintiff's action. No survey or plan was filed, although one was mentioned at the outset of the trial. Aside from this, it is perfectly clear from the evidence that the strip of land in dispute is the northerly 5 feet of the southerly 40 feet of lot 24. In other words, it was the 5-foot frontage lying to the south of the fence erected and re-erected by the defendants.

Some confusion appears to have prevailed before and at the trial as to just what the defendants had acquired by the unregistered agreement with Campbell (ex. 4). The defendants in their original purchase acquired title only to the southerly 35 feet of the lot in question, together with a right of way over the 5-foot strip immediately contiguous to the north thereof. The defendant Alfred Taylor, on cross-examination, stated—and I quote from pp. 44-5 of the transcript of evidence:

“Q. Now, Mr. Taylor, you have already testified and I believe there is an exhibit put in that you agreed to buy this property from the two Mr. Hellers originally? A. Yes.

“Q. And in that deed you were to get 35 feet on Shamrock Street? A. Yes.

“Q. Together with a right of way over the northerly 5 feet of the southerly 40 feet? A. Yes.

“Q. So that is the 5 feet right adjacent to you? A. Yes.

“Q. That is what you originally agreed to buy from the two Mr. Hellers? A. The 35 feet.

“Q. The 35 feet plus the 5 feet right of way? A. I was sure of 35 feet and this 5 feet on the other side.

“Q. Yes, the right of way over the other 5 feet? A. Yes.

“Q. Then subsequently to that you got an agreement from a man by the name of Campbell to sell you, for one dollar, the 5 feet? A. Yes. . . .

“Q. But it is a fact that you never did get a deed from anybody for that 5 feet? A. No, I didn't get a deed for it.

“Q. And the agreement which you have filed here, you never registered that in the Registry Office; that is the agreement for the 5 feet from Campbell? A. No.

“Q. You never registered that? A. No.

“Q. Now, after you got the 5 feet by the agreement from Campbell, you considered that you owned 40 feet. Is that correct? A. Yes.

“Q. And that agreement from Campbell is back in 1921? A. Yes.

“Q. So that from 1921 on, is it fair to say that you felt you owned 40 feet? A. Certainly.

“Q. And that is your position to-day? A. Yes.”

Despite this, the unregistered agreement (ex. 4) only refers to the purchase of “the right of way over” the northerly 5 feet of the southerly 40 feet of lot 24. In dealing with their property

by way of mortgage subsequent to their alleged acquisition of title to the 5-foot right of way as mentioned, the defendants conveyed only the southerly 35 feet of the lot together with the right of way as aforesaid. The defendants at no time were assessed for or paid taxes on the 5-foot strip as the owners of the fee therein, nor did they receive any deed thereof. The highest right which the defendants hold in the 5-foot strip is that of an easement over it—unless they have acquired a possessory title thereto.

This claim of the defendants to a possessory title might be well founded were it not for the interruption in their possession caused by the tax sale in 1938. It is well established that a tax sale interrupts and creates a fresh starting-point for any claim to a possessory title: see *Smith v. The Midland Railway Company* (1883), 4 O.R. 494; *Soper v. City of Windsor* (1914), 32 O.L.R. 352, 22 D.L.R. 478; *Re Hunt and Bell* (1915), 34 O.L.R. 256, 24 D.L.R. 590. If, therefore, the tax sale and deed are valid, then in my opinion the plaintiff is entitled to succeed in his action. This, therefore, leaves the success of the action dependent on the second and third reasons of the trial judge.

The deed to the City of Sarnia dated the 20th December 1939 (ex. 4) pursuant to the tax sale proceedings conveys "all that certain parcel or tract of land and premises being composed of the north forty-four feet, ten inches of lot number twenty-four on the west side of Shamrock Street in the City of Sarnia . . . according to Plan No. 25". After referring to this, the trial judge in his reasons then proceeds to say:

"No such block exists as a block held by a former owner whose land has been sold for taxes. It would only appear from the abstract, ex. 3, that the Lambton Loan and Investment Company did have a title to the north one-half of lot 25 [*sic*] subject to a right of way over the north 5 feet of the south 40 feet thereof."

With respect, I do not so read the abstract. There appears to be no variation of the description of that part of the land now claimed by the plaintiff and that to which the loan company held title. In any event the parties proceeded to trial on the assumption, and without raising any question, that the lands were fully identified. There is evidence that the lands in question were the subject of the tax sale.

It appears to me that the main reason of the trial judge for the dismissal of the action was his finding that the tax deed was a nullity on the ground that it was executed and delivered within one year of the sale date, the 20th December 1938, namely on 20th December 1939, and in doing so the trial judge felt that he was bound by the judgment of the Supreme Court of Canada in *Heron et al. v. Lalonde et al.*, *supra*.

That was a case arising under the assessment and taxation laws of the Province of British Columbia. The reasons for judgment refer to the British Columbia Assessment Act, 1903, 3-4 Ed. 7, c. 53, ss. 125, 153 and 156. The provisions of ss. 125 and 156 are not material to the consideration of the present appeal.

By s. 152 of that Act a deed purporting to be issued for a sale of lands for arrears of taxes, and purporting to be executed in the manner provided by the Act, was made *prima facie* evidence that such deed was the tax sale deed which it purported to be and that the sale alleged in the deed was conducted in a fair and open manner, and that there were taxes due and in arrear upon the lands described at the time of the sale for which the same could be sold.

Section 153 provided that "A tax sale deed shall, in any proceedings in any Court in this Province . . . be *conclusive evidence* of the validity of the assessment of the land and levy of the rate, the sale of the land for taxes, and *all other proceedings leading up to the execution of such deed . . .*" (The italics are mine.)

The provision of this section was carried through and was in the enactments current in British Columbia at the time of the litigation in question.

With respect I do not conceive that this is an authority binding upon the trial judge in view of the different wording which is to be found in the Ontario statute, The Assessment Act, R.S.O. 1950, c. 24, which contains the precise wording to be found in R.S.O. 1937, c. 272. The pertinent sections in the Ontario Act are ss. 181 and 182 (formerly ss. 185 and 186), which read respectively as follows:

"181. If any part of the taxes for which any land has been sold in pursuance of any Act heretofore in force in Ontario or of this Act, had at the time of the sale been in arrear for three years as mentioned in section 131, and the land is not redeemed

in one year after the sale, such sale, and the official deed to the purchaser (provided the sale was openly and fairly conducted) shall notwithstanding any neglect, omission or error of the municipality or of any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto be final and binding upon the former owner of the land and upon all persons claiming by, through or under him, it being intended by this Act that the owner of land shall be required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof, and in default of the taxes being paid or the land being redeemed as aforesaid, the right to bring an action to set aside the said deed or to recover the said land shall be barred.

"182. Wherever land is sold for taxes and a tax deed thereof has been executed, the sale and the tax deeds shall be valid and binding, to all intents and purposes, except as against the Crown, unless questioned before some court of competent jurisdiction within two years from the time of sale."

It will be noted that whereas the British Columbia statute provided that the tax sale deed would be "conclusive evidence of the validity of . . . all other proceedings leading up to the execution of such deed", no protection is given by that Act for any neglect, omission or error in the execution of the deed itself or its delivery. The Ontario Act, on the other hand, provides for validity notwithstanding any neglect, omission or error of the municipality or any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto. This would include, in my opinion, the execution and delivery of the tax deed, it being intended, as expressed in s. 181, that the owner of lands shall be required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof.

Further, the Legislature intended, as so succinctly stated, that in default of the taxes being so paid or the land being so redeemed, the right to bring an action to set aside the deed or to recover the land should be barred. Furthermore, the Ontario Act in s. 182 contains a provision which I have been unable to locate in the British Columbia statute.

In the present case the tax deed, which was executed on 20th December 1939, is valid unless questioned in some Court of

competent jurisdiction within two years from the time of the sale, which was on 20th December 1938.

I am therefore of the opinion that the plaintiff is entitled to succeed in his action.

There will therefore be judgment for the plaintiff declaring that he is entitled to possession of the northerly 44 feet 10 inches of lot 24 aforesaid, subject to the right of way in question. The plaintiff shall also be entitled to an injunction restraining the defendants from interfering with his lawful use of the said lands.

The question of damages is one on which there is no dependable evidence, and therefore I would award only nominal damages in the sum of \$50, together with the costs throughout, both on appeal and at trial.

There being no cross-appeal the judgment stands in so far as the defendants' counterclaim is concerned.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant; Moorhouse & Shortt, London.

Solicitors for the defendants, respondents: Donohue & Maher, Sarnia.

[SCHROEDER J.]

Boothe v. The Town of Simcoe.

Choses in Action—Assignment—Validity of Equitable Assignment—Designation of Fund from which Payment to be Made—Necessity and Reason for Notice to Debtor—Creation of Trust by Assignment—The Conveyancing and Law of Property Act, R.S.O. 1950, c. 68, s. 53.

A purported assignment of a debt that does not designate a specific fund from which payment is to be made by the debtor to the assignee is not a valid equitable assignment, but is at most a direction to the assignee to receive payment from the debtor, or an authorization to the debtor to pay the assignee. *Percival v. Dunn* (1885), 29 Ch. D. 128, applied. Extrinsic evidence, either parol or written, is admissible to show the intention of the parties, and so to designate the fund as to constitute the order for payment an equitable assignment. *Lane v. The Dungannon Agricultural Driving Park Association* (1892), 22 O.R. 264; *Elgie v. Edgar* (1906), 8 O.W.R. 944; 9 O.W.R. 614; *Conrad v. Kaplan* (1914), 24 Man. R. 368, referred to.

The only reason for requiring the assignee of a chose in action to give notice of the assignment to the debtor is to protect the latter against further assignments or any right of set-off, and to secure him against other claims. *Sovereign Bank v. The International Portland Cement Co.* (1907), 14 O.L.R. 511, referred to. Where an assignment contains an express provision that any moneys received thereafter by the assignor shall be held in trust for the assignee, that provision has full effect, subject to the higher rights of other assignees who give notice to the debtor earlier.

Income Tax—Deduction by Employer—Crown's Priority for Payment—Inapplicability where Moneys Held under Trust for Other Persons—The Income Tax Act, 1948 (Can.), c. 52, s. 112(6), re-enacted by 1949, 2nd sess., c. 25, s. 44(1).

Section 112(6) of The Income Tax Act, which gives the Crown a priority for amounts deducted or withheld for income tax and not paid over, can have no application in the distribution by a trustee of moneys held by him on behalf of assignees of an employer who has made such deductions. The moneys, being impressed with a trust in favour of the assignees, are not the property of the employer, and there is therefore nothing to which the Crown's priority can attach.

A MOTION by a trustee for the opinion, advice and direction of the Court.

31st October 1951. The motion was heard by SCHROEDER J. in Weekly Court at Toronto.

J. E. Corcoran, K.C., for the trustee, applicant.

J. D. Arnup, K.C., for wage-earners and ordinary creditors.

C. A. Thompson, K.C., for the Royal Bank of Canada, assignee.

H. E. Beckett, K.C., for National Sewer Pipe Company Limited, assignee.

M. J. Haffey, for Adams Lumber Company Limited, Norfolk Motors Limited and W. H. Abbey & Company Limited.

31st October 1951. SCHROEDER J. (orally):—This is a motion made on behalf of Frank O. Tidy, trustee, for the advice, opinion and direction of the Court as to the payment of moneys held by him on behalf of the creditors of B. K. Boothe Construction, and more particularly with respect to the following questions:

"1. Does the Royal Bank of Canada by virtue of its assignment rank with those creditors who had filed assignments with the Town of Simcoe prior to the date of the said Judgment?

"2. Does the Royal Bank of Canada by reason of its assignment rank in priority to the other creditors of B. K. Boothe Construction?

"3. If the Royal Bank of Canada does not rank in priority to the other creditors then in what order shall the other creditors be paid?"

The circumstances under which these moneys came into the hands of Mr. Tidy as trustee are briefly as follows:

The Boothe construction company had entered into a contract with The Corporation of the Town of Simcoe for the laying of sewer-pipe. The construction company claimed payment of a balance of moneys due under the contract, which the municipal corporation refused to pay. An action was brought and came on for trial before Mr. Justice Treleaven. The case was settled by agreement between the parties and this settlement was carried into a consent judgment which bears date the 2nd February 1951. The plaintiff, by this judgment, recovered from the defendant the sum of \$13,391.47 in full settlement of all claims and demands against the defendant, but the judgment contained a direction that this sum was to be "paid to F. O. Tidy of the City of Toronto, Trustee, for distribution among the creditors of the Plaintiff in accordance with their respective rights, subject however:

"(a) Firstly to the lien of the solicitor for the Plaintiff for his fees, costs and disbursements . . .

"(b) Secondly to payment in full of all claims secured by conditional sales or liens in connection with the contract in the pleadings mentioned.

"(c) Thirdly having regard to assignments or orders for payment given by the Plaintiff to creditors and filed with the Defendant."

The contract between the plaintiff and the defendant was entered into on the 18th June 1948 and on the 21st June 1948 the plaintiff made an assignment of the contract and of all moneys due or to accrue due under it to the Royal Bank of Canada. The bank, on the strength of this assignment, made advances to the construction company from time to time and at the date of the judgment to which I have alluded there was due to the bank by the plaintiff the sum of \$15,479.53.

The affidavit of the trustee discloses that there were in the hands of the municipality prior to the date of the judgment assignments or alleged assignments from the construction company to three creditors, namely, Adams Lumber Company Limited in the sum of \$1,247.54; National Sewer Pipe Company Limited for \$2,336.95, and Norfolk Motors Limited in the sum of \$1,958.15.

There were numerous creditors to whom varying amounts were owing, including wage-earners, His Majesty in the right of the Dominion of Canada in respect of income tax deductions which had been made by the plaintiff to the extent of \$522.85, the Unemployment Insurance Commission in respect of deductions made from the wages of the employees for unemployment insurance in the sum of \$142.76, and a claim of the Workmen's Compensation Board for compensation assessments levied by the Board amounting to \$954.39, all of which were unpaid at the date of the judgment.

The Royal Bank of Canada did not serve notice of its assignment on the municipality until the 6th February 1951, that is, until four days after the date of the judgment but prior to its entry, and did not serve notice of its assignment on the trustee, Mr. Tidy, until the 8th February 1951. It is established that the assignments in favour of the Adams Lumber Company Limited and Norfolk Motors Limited were filed with the municipality on the 25th July 1949, and that of the National Sewer Pipe Company Limited on the 20th July 1949.

It is conceded by counsel for the Royal Bank of Canada that if the assignments in favour of these three parties are valid assignments, either at common law or in equity, they rank in priority to the assignment in favour of the bank, applying the principle in *Dearle v. Hall*; *Loveridge v. Cooper* (1828), 3 Russ. 1, 38 E.R. 475, as more recently discussed in *Pettit and Johnston v. Foster Wheeler Limited*, [1950] O.R. 83, [1950] 2 D.L.R. 42,

affirmed with a variation, [1950] O.W.N. 474, [1950] 3 D.L.R. 320. Counsel for the bank contends that the alleged assignment in favour of the National Sewer Pipe Company Limited is not a valid assignment and is, at most, a direction to the National Sewer Pipe Company Limited to receive from the clerk-treasurer of the Town of Simcoe the sum of money therein specified and that, to put it on an even higher basis, it is at most an authorization to the clerk-treasurer of the Town of Simcoe to pay that sum to the company. He contends, however, that inasmuch as no fund is specified in the document which purports to be an equitable assignment in favour of the National Sewer Pipe Company Limited out of which the payment was to be made, it cannot be regarded by the Court as a valid, binding assignment which gives the said assignee any special rights of priority over ordinary creditors. He relies upon the judgment in the case of *Percival v. Dunn* (1885), 29 Ch. D. 128, in which it was held that an order by a creditor to his debtor to pay a sum of money to a third person is not an equitable assignment unless it specifies the fund or debt out of which the payment is to be made. In that case a builder, being a debtor to the plaintiff and a creditor of the defendant, handed to the plaintiff an order signed by him and addressed to the defendant reading as follows: "Please pay P. the amount of his account, £42 14s. 6d. for goods supplied." It was held that the order did not operate as an equitable assignment. This principle has been applied in many cases, a collection of which is to be found in the English and Empire Digest, vol. 8, at p. 450. Bacon V.C. at p. 131 said that the documents were, at most, requests to the debtor to pay money which the writers owed to someone else, and he said that they might be paraphrased in this way: "Lend me so much money, as I want to pay the man to whom I am indebted".

On the material before me I am of the opinion that what purports to be an assignment in favour of the National Sewer Pipe Company Limited is not a good equitable assignment since it fails to specify the fund out of which payment is directed to be made and it, therefore, comes clearly within the principle enunciated in the case of *Percival v. Dunn*, *supra*.

Since the hearing I have considered the following cases, which were not cited to me: *Lane v. The Dungannon Agricultural Driving Park Association* (1892), 22 O.R. 264; *Elgie v. Edgar* (1906), 8 O.W.R. 944, affirmed 9 O.W.R. 614; *Conrad v.*

Kaplan (1914), 24 Man. R. 368, 6 W.W.R. 1061, 28 W.L.R. 464, 18 D.L.R. 37. These cases make it clear that extrinsic evidence, in writing or parol, is admissible to show the intention of the parties, and so to designate the fund as to constitute the order for payment an equitable assignment.

The evidence before me is not conclusive as to the circumstances surrounding the giving of the order in question, but counsel for the National Sewer Pipe Company Limited states that there may be other documents in the possession of his clients which would make some difference in its position. I can deal only with the material which is before me but I suggest, in order that no injustice may be done, that the formal order herein be not taken out until counsel for the National Sewer Pipe Company Limited shall have had an opportunity to consult his client's records and the Registrar may be notified as to whether or not he wishes to speak to the matter further in so far as this aspect of the motion is concerned.

Mr. Arnup, representing Mr. Alan B. Drew in his capacity as a wage-earner and an ordinary creditor, as well as Mr. D. E. Boothe, also a wage-earner, and by representation order all the ordinary creditors of the plaintiff construction company, contends that when the formal judgment was taken out the rights of all parties became crystallized and that the bank, not having at that time given a notice of its assignment to the municipality, can assert no higher rights at this time than those possessed by an ordinary creditor. He is unable to advance any authority for this proposition and I find myself quite unable to accept it. In my view the substance of the transaction which culminated in the consent judgment against the municipality was a voluntary assignment of a particular asset from the Boothe construction company to a trustee in trust to hold the same and distribute it among the creditors of the construction company according to their respective rights and interests. It is expressly provided by the assignment made in favour of the bank, in para. 4, that: "All moneys received by the [contractor] from the collection of the debts shall be received in trust for the Bank."

Notwithstanding the lateness on the part of the bank in notifying the municipality or the trustee of its assignment, these moneys are still impressed with a trust in favour of the bank arising from the terms and provisions of the assignment referred to, and these moneys, subject to the prior rights of assignees

under other valid assignments, are the property of the bank. The only reason why notice must be given to the debtor of an assignment of a chose in action is to protect him against further assignments or any right of set-off, and to secure him against other claims: see *Sovereign Bank v. The International Portland Cement Co.* (1907), 14 O.L.R. 511. If, of course, he has no notice of the assignment, he is fully protected if he should make payment to the assignor without such notice as is required to be given under s. 53 of The Conveyancing and Law of Property Act, R.S.O. 1950, c. 68.

Mr. Arnup argues with great force that when the judgment of Mr. Justice Treleaven was rendered the municipality had completely extinguished its obligation to the construction company. I must most respectfully decline to acquiesce in that proposition. In my opinion the municipality did not extinguish its obligation, which had become merged in the judgment, until it paid the sum payable under the judgment either to the plaintiff in the action or to the trustee therein named.

This leaves for consideration the claims of the wage-earners, His Majesty in the right of the Dominion of Canada in respect of income tax deductions and in respect of deductions made for unemployment insurance, and the claim of the Workmen's Compensation Board for unpaid assessments. The first claim of the Crown as to priority arises under s. 112(6) of The Income Tax Act, 1948 (Can.), c. 52, re-enacted by 1949, 2nd sess., c. 25, s. 44(1), which gives it priority in very sweeping terms against the property of the person who makes deductions as contemplated by the Act. The short answer to that claim must be, however, that these moneys, being impressed with a trust in favour of the various assignees, are not the property of the construction company which made the deductions and there is, therefore, nothing to which the Crown's priority can attach. The same may be said with respect to the claim in respect of unemployment insurance deductions as well as the Workmen's Compensation Board assessments. As to the latter, The Workmen's Compensation Act, R.S.O. 1950, c. 430, s. 112, gives the Board priority in respect of such assessments only where distribution is made under three distinct Acts mentioned in s. 112 of The Workmen's Compensation Act, and admittedly this case is not covered by any of the statutes which are there mentioned.

For the reasons I have given the questions which are propounded on this motion will have to be answered as follows:

Question 1 will be answered by declaring that the Royal Bank of Canada, by virtue of its assignment, ranks in priority next after the Adams Lumber Company Limited and Norfolk Motors Limited.

Question 2 will be answered in the affirmative.

Question 3 need not be answered.

Possibly there should be a declaration that the National Sewer Pipe Company Limited is to be paid as though it were an ordinary creditor, subject to such view as the Court may take in the light of such further material as may be filed on its behalf. In that case the Registrar may be notified and I shall hear further argument from all the interested parties at a convenient time.

The costs of all parties are to be paid out of the fund, those of the trustee on a solicitor-and-client basis.

Order accordingly.

Solicitors for the trustee, applicant: Godfrey & Corcoran, Toronto.

Solicitors for the Royal Bank of Canada: Aylesworth, Garden Thompson & Stanbury, Toronto.

[BARLOW J.]

Lipman v. Traders Finance Corporation Limited et al.

Conditional Sales—Effect of Subsequent Sale by Buyer, before Discharge of Conditional Sale Agreement—Sale by Dealer in Usual Course of Business—The Conditional Sales Act, R.S.O. 1950, c. 61—The Bills of Sale and Chattel Mortgages Act, R.S.O. 1950, c. 36, ss. 1(a), 8—The Sale of Goods Act, R.S.O. 1950, c. 345, s. 25.

D., the buyer of an automobile under a conditional sale agreement, purported to sell the car to his wife, from whom he took a new conditional sale agreement which he assigned to a finance company. The balance under D.'s original contract was not paid at the time of the purported sale to his wife, and he retained possession of the car, which he later resold to another buyer, who then paid the balance owing under the original agreement.

Held, the second buyer from D., and subsequent buyers, acquired a good title to the car, free from any claim of the finance company under the contract signed by Mrs. D. At the time of that contract D. had no title, but only a right to possession, and the finance company, as his assignee, never became the owner. *Walker et al. v. Hyman* (1877), 1 O.A.R. 345 at 350, referred to. Further, the purported sale to Mrs. D., which was not accompanied by a change of possession, was null and void as against subsequent purchasers because of the absence of a bill of sale, as required by ss. 1(a) and 8 of The Bills of Sale and Chattel Mortgages Act. *Eby v. McTavish* (1900), 32 O.R. 187; *Hogaboom v. Graydon* (1895), 26 O.R. 298; *Maas v. Pepper*, [1905] A.C. 102, referred to. Finally, D. being a used car dealer and the subsequent sale by him having been made in the usual course of business, s. 25 of The Sale of Goods Act operated to give a good title to the buyer.

AN ACTION for a declaration of ownership and for damages.

25th and 26th October 1951. The action was tried by BARLOW J. without a jury at Toronto.

R. M. Willes Chitty, K.C., and *Charles Lea*, for the plaintiff.
F. G. Gardiner, K.C., for the defendants.

7th November 1951. BARLOW J.:—The plaintiff's claim is for a declaration that he is the owner of a 1947 Cadillac convertible vehicle free from any claim of Traders Finance Corporation under a conditional sale agreement made between John T. Dwyer as vendor and his wife Eva I. Dwyer as purchaser, dated the 22nd April 1948 and assigned by John T. Dwyer to the defendant Traders Finance Corporation, and for damages for seizure and detention of the said vehicle.

On the 5th June 1950 the defendants Harker and Company, as bailiffs for the defendant Traders Finance Corporation, and acting on the latter's instructions, seized the vehicle in question for non-payment of the amount due under the above-mentioned conditional sale agreement.

The plaintiff brought this action, obtained an order for replevin and deposited a bond to stand as security for the vehicle.

The records of the Department of Highways show that the first licence issued for the 1947 Cadillac convertible in question was issued in 1947 to Charles McVittie, as licence plate no. 28-B-10. On the 22nd July 1947 Charles McVittie transferred the vehicle in question to Stoney's Car Market. On the 20th April 1948 Stoney's Car Market sold the car to John T. Dwyer of Trenton, at which time a conditional sale agreement was entered into by Stoney's Car Market as vendor and John T. Dwyer as purchaser, showing a purchase price of \$6,500 and total deferred payments of \$4,932. This conditional sale agreement was duly assigned by Stoney's Car Market to Danforth Discount Limited and pursuant to The Conditional Sales Act, now R.S.O. 1950, c. 61, a copy thereof was filed on the 26th April 1948 in the County Court Clerk's Office at Belleville, in the county in which the purchaser, Dwyer, resided.

On the 21st April 1948 the vehicle, under licence no. 3-F-417 (being the 1948 licence issued to Stoney's Car Market) was transferred on the records of the Highway Department by Stoney's Car Market to John T. Dwyer.

On the 22nd April 1948, two days after John T. Dwyer purchased the vehicle from Stoney's Car Market, John T. Dwyer purported to sell the vehicle in question to his wife, Eva I. Dwyer, in connection with which John T. Dwyer as vendor and his wife Eva I. Dwyer as purchaser entered into a conditional sale agreement on Traders Finance Corporation's form for a purchase price of \$6,800 and total deferred payments of \$4,312. This agreement was assigned by John T. Dwyer to Traders Finance Corporation and duly filed on the 24th April 1948 in the County Court Clerk's Office at Belleville.

On the 30th April 1948 John T. Dwyer transferred the licence of the vehicle in question, being licence no. 3-F-417, to Dwyer Motor Sales, the name under which he carried on a used car business at Trenton. On the 27th September 1948 Dwyer Motor Sales transferred licence no. 3-F-417 to John T. Dwyer.

On the 16th October 1948 John T. Dwyer sold the motor vehicle in question, at which time he guaranteed the same to be free from any lien or other charge, to West End Motor Sales of Belleville, and took in payment four small cars. On the same date West End Motor Sales sold the vehicle in question to Decarie Motors of Montreal.

On the 10th November 1948 John T. Dwyer transferred licence no. 3-F-417 to West End Motor Sales.

The next record of the vehicle in the Ontario Highways Department records is on the 20th May 1949, when one Louis Golant brought in to the Ontario Highways Department a Quebec licence plate and had issued to him a new licence plate no. 51-B-65 for the vehicle in question. On the 4th June 1949 Louis Golant transferred licence no. 51-B-65 to J. J. Carley, a used car dealer. On the 13th June 1949 J. J. Carley had licence plate no. 51-B-65, which had become damaged, replaced by licence plate no. 306-B-2 for the said vehicle. On the 6th October 1949 J. J. Carley sold the vehicle for cash to the plaintiff Manuel Lipman, and transferred licence plate no. 306-B-2 to Manuel Lipman. The plaintiff Lipman used the vehicle in question until the 5th June 1950, when it was seized when standing in front of his house by the bailiffs, Harker and Company.

The above shows the various dealings with the motor vehicle in question, at least in so far as they are pertinent to this action.

Did West End Motor Sales, when purchasing the motor vehicle in question from John T. Dwyer, get a good title to the same free from any claim by Traders Finance Corporation? If it is so found then the plaintiff must succeed.

The plaintiff was in possession of the motor vehicle in question at the time of the seizure and the presumption is that the plaintiff was the owner. The onus is upon the defendants to rebut that presumption: *Penner v. Simpson*, 49 Man. R. 199, [1941] 3 W.W.R. 235, [1941] 4 D.L.R. 229 at 234.

I shall first consider the conditional sale agreement between John T. Dwyer and his wife, Eva I. Dwyer, as purchaser, dated the 22nd April 1948 and assigned by Dwyer to the defendant Traders Finance Corporation.

By virtue of the conditional sale agreement dated the 20th April 1948 between John T. Dwyer and Stoney's Car Market, the title to the vehicle in question remained in Stoney's Car Market, or in its assign Danforth Discount Limited to whom the agreement was assigned. John T. Dwyer merely obtained the right to possession of the vehicle, which possession was taken by him. It therefore follows that on the 22nd April 1948, when John T. Dwyer entered into a conditional sale agreement

with his wife Eva I. Dwyer, he had no title to the vehicle in question.

The Conditional Sales Act, under which this conditional sale was made, presupposes ownership remaining in the vendor and delivery of possession to the purchaser. At the time of the making of the conditional sale agreement John T. Dwyer merely had possession of the motor vehicle. When John T. Dwyer assigned the conditional sale agreement in question to Traders Finance Corporation the latter acquired no higher rights than John T. Dwyer, and it therefore never acquired ownership in the motor vehicle in question. For reference see *Walker et al. v. Hyman* (1877), 1 O.A.R. 345 at 350.

For these reasons this conditional sale agreement is invalid as against the title of West End Motor Sales, the purchaser from John T. Dwyer.

Counsel for the defendants contends that when West End Motor Sales of Belleville paid the amount owing on the conditional sale agreement of the 20th April 1948 to Danforth Discount Limited, to whom the same had been assigned by Stoney's Car Market, the conditional sale agreement held by Traders Finance Corporation became a valid conditional sale agreement. I cannot so find for the reason that the title to the same never came to John T. Dwyer or his assignee Traders Finance Corporation, because the amount owing on the conditional sale agreement dated the 20th April 1948 was paid by West End Motor Sales after they purchased the vehicle in question, and the said conditional sale agreement was assigned by Danforth Discount Limited to West End Motor Sales of Belleville.

Furthermore, West End Motor Sales obtained a good title to the said vehicle free from any claim under the conditional sale agreement held by Traders Finance Corporation because John T. Dwyer always retained possession of the said vehicle. The evidence establishes that Eva I. Dwyer never took possession of the vehicle. Furthermore, the licence to the vehicle was never transferred to Eva I. Dwyer. John T. Dwyer came into possession of the vehicle in question on the 20th April 1948 and so remained in possession until he sold the said vehicle to West End Motor Sales on the 16th October 1948. The sale to Eva I. Dwyer was "absolutely null and void" as against the subsequent

purchaser, West End Motor Sales, because no bill of sale accompanied by necessary affidavits of the attesting witness and of Eva I. Dwyer was ever entered into, and there was no registration of any such document. The pertinent sections of The Bills of Sale and Chattel Mortgages Act, R.S.O. 1950, c. 36, are as follows:

"1. In this Act,

"(a) 'actual and continued change of possession' means such change of possession as is open and reasonably sufficient to afford public notice thereof, . . . "

"8. Every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under this Act, and such conveyance accompanied by an affidavit of an attesting witness thereto of the due execution of the conveyance, and an affidavit of the bargainee that the sale is *bona fide* and for good consideration, as set forth in the conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, shall be registered, as hereinafter provided, otherwise the sale shall be absolutely null and void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith."

For reference see *Eby v. McTavish* (1900), 32 O.R. 187; *Hogaboom v. Graydon* (1895), 26 O.R. 298; and *Maas v. Pepper*, [1905] A.C. 102.

Furthermore, the sale by John T. Dwyer to West End Motor Sales was a sale to which The Sale of Goods Act, R.S.O. 1950, c. 345, s. 25, applies. West End Motor Sales purchased from John T. Dwyer the vehicle in question, which vehicle was in the possession of Dwyer. He, having purported to sell the same to his wife Eva I. Dwyer, nevertheless continued in actual possession of the same, and as a used car dealer in the course of business made a sale of the said vehicle to West End Motor Sales. The latter purchased the said vehicle in good faith, and without notice of the previous sale. This was sufficient to transfer a good title free from the claim of Traders Finance Corporation under s. 25 of The Sale of Goods Act referred to above, which section is as follows:

“(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

“(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

“(3) In this section, ‘mercantile agent’ means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.”

See *Bender v. National Acceptance Corporation Ltd.*, 63 O.L.R. 215, [1929] 1 D.L.R. 222. That case is almost identical with the case at bar except that there was no prior conditional sale agreement. It was an action for replevin against a finance company. National Acceptance Corporation held a conditional sale agreement arising out of the sale of a motor vehicle by one Embree, a dealer in automobiles, to one Currie. Embree, the vendor, remained in possession of the motor vehicle and subsequently sold it to the plaintiff. Riddell J.A. at p. 217 says:

“It is of no importance whether the defendants or Currie should be considered the purchaser; on the findings of fact, the ‘person having sold (the) goods’ continued in possession, and was in possession of them when he, i.e., Embree, sold the car to the plaintiff. This was effective to transfer the property to the plaintiff under the Act, sec. 25 [which section was the same as s. 25 quoted above].”

I therefore find that West End Motor Sales acquired a good title to the vehicle in question free from any claim of the defendant Traders Finance Corporation. The evidence does not show that the dealings with the vehicle in question subsequent to the purchase by West End Motor Sales affect the plaintiff's title. I find that the seizure of the said vehicle by the defendants Harker and Company, acting on instructions received from the defendant Traders Finance Corporation, was an illegal seizure.

The plaintiff is entitled to the declaration as asked. The plaintiff is also entitled to damages. The plaintiff in the replevin proceedings was required to file a bond upon which he has paid premiums of \$240. The plaintiff was without the use of the vehicle in question for ten days. I assess his damages for loss of the use of the vehicle at \$50.

Judgment will go for a declaration that the plaintiff is the owner of the vehicle in question free from any claim of Traders Finance Corporation, and for damages in the sum of \$290, and for costs.

Judgment for plaintiff.

Solicitors for the plaintiff: Lee & Raymond, Toronto.

Solicitors for the defendants: Parkinson, Gardiner, Willis & Roberts, Toronto.

[COURT OF APPEAL.]

Re Bondi Better Bananas Limited and Vallario et al. and
Bondi et al.

Companies—Winding-up—By Order of Court—“Just and equitable” Provision—Deadlock in Management and Mutual Distrust—Private Company with Equal Shareholdings and Control—Applicability of Principles Governing Dissolution of Partnership—The Companies Act, R.S.O. 1950, c. 59, s. 192(c).

Where a private company is formed to take over the assets and undertaking of a partnership, the arrangement being that each of the two former partners shall have equal shareholdings and equal control in the management of the company, and a deadlock arises between the two factions, this deadlock alone is, in the circumstances, sufficient reason for holding that it is “just and equitable” that the company be wound up. Further, the principles governing the dissolution of partnerships apply to the circumstances and, that being so, the existence of “continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation” (Lindley on Partnership, 11th ed. 1950, p. 691) is sufficient to justify the order. *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426; *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783; *Re Winding-up Ordinance and Re Timbers Limited* (1917), 11 Alta. L.R. 432, applied.

Companies—Shares—Restrictions on Transfer—Private Company—Refusal of Directors to Consent to Transfer—Refusal of Court to Interfere—The Companies Act, R.S.O. 1950, c. 59, s. 1(c).

Where the letters patent of a private company provide, in pursuance of the very broad terms of s. 1(c) of The Companies Act, that “no shares shall be transferred without the express sanction or approval of a majority of the directors”, the Court will not interfere with the action of the directors in approving or refusing to approve a proposed transfer of shares, unless it is shown that their action was not the result of a *bona fide* view as to the interests of the company. *Re Phillips and La Paloma Sweets Limited* (1921), 51 O.L.R. 125 at 127, approved; *In re Smith and Fawcett, Limited*, [1942] Ch. 304 at 308, quoted with approval.

Order of Ferguson J., *ante*, p. 410, reversed in part.

APPEALS by both sets of parties from the order of Ferguson J., *ante*, p. 410, [1951] 3 D.L.R. 522, 32 C.B.R. 74.

26th and 27th September 1951. The appeals were heard by HENDERSON, HOPE, AYLESWORTH, BOWLBY and MACKAY JJ.A.

1. *As to the refusal of a winding-up order.*

J. J. Robinette, K.C. (F. W. Fisher, K.C., with him), for J. B. Vallario and F. A. Vallario, appellants: This is a private, “two-man” company, and the same principles apply to the winding-up of such a company as to the dissolution of a partnership. The rule in such cases is that the association should be terminated when there is such animosity and disagreement that there is no reasonable hope of reconciliation. We also submit that winding-up is justified on the ground of deadlock. The learned judge was wrong in saying that all the differences and disagree-

ments stemmed from Vallario's desire to have the company wound up, and his fundamental error was that he did not consider all the facts.

This Court is in as good a position as Ferguson J. was to decide the issue; the case is not like one in which there has been a finding as to credibility. Our submission is that the trouble did not originate with us, but that even if it did Bondi unreasonably retaliated, and that the situation to-day is consequently hopeless. [HENDERSON J.A.: Your argument is that it does not matter who started the difficulties?] Yes, the essential thing is that the situation now exists. The company is losing its assets; all it has now is some money in the bank, a few government bonds, some accounts receivable, and a few trucks. Neither Bondi nor Vallario has received any salary since early in 1950. In these circumstances it is surely "just and equitable" that the company should be wound up. Winding-up will harm no one; the money in the bank and the bonds can be divided, and Bondi has the premises, which he owns, and his name, and could carry on the business to-morrow. If winding-up is not ordered the situation will be hopeless, as is proved by the conduct of the parties.

The worst that Vallario did was to protect his interests, and in any event the Court does not refuse a winding-up order merely because the applicant is in the wrong. Matters are now so bad that nothing could improve them.

We rely on *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426; *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783 at 791; *Re White Castle Inn Limited*, [1946] O.W.N. 773; *Re Phillips and La Paloma Sweets Limited* (1921), 51 O.L.R. 125 at 127, 66 D.L.R. 577; *In re Smith and Fawcett, Limited*, [1942] Ch. 304, [1942] 1 All E.R. 542.

Lewis Duncan, K.C., for F. S. Bondi and Sadie Bondi, respondents: The principles governing dissolution of partnerships have never been applied in this jurisdiction to the winding-up of companies under the "just and equitable" jurisdiction. This jurisdiction is exercised only when there is no way of overcoming the deadlock. In this case the deadlock can be broken by the use of a casting vote at a shareholders' meeting under s. 50(3) of The Companies Act, R.S.O. 1950, c. 59. This means that there is a constitutional difference between a company and a partnership. [AYLESWORTH J.A.: The ultimate position is that Bondi proposes

to invoke that section of the Act to secure overriding control of the company's policy.] [HOPE J.A.: There might be more in what you argue if Bondi wished to have the shares transferred to nominees of himself and Vallario, but he wishes them transferred to his own nominees only.] If the legislation provides a method of keeping the company in operation there can be no question of morality.

There was nothing discreditable in our raising the rent of the premises; the evidence shows that Bondi has accepted \$50 a month less than he could have obtained elsewhere. Vallario's letters instructing suppliers to stop shipping without orders signed by both the president and the secretary was contrary to the by-laws of the company, which make Bondi president and general manager. Vallario's whole behaviour disqualifies him from seeking a winding-up order.

There is no situation of invincible deadlock, and a temporary difficulty is not a ground for winding up: *Re Michael P. Georgas Co. Ltd.*; *Arnold et al. v. Georgas et al.*, [1948] O.R. 708, [1948] 4 D.L.R. 296, 29 C.B.R. at 94. The Canadian cases on the operation of the "just and equitable" rule are to be found in *Wegenast*, *Law of Canadian Companies*, 1931, pp. 103-4.

A shareholder is entitled to transfer his shares to another in order to increase his voting power. [HOPE J.A.: Vallario could do the same thing until all the shares were reassembled; it would be a race to see who could assign them first.] Vallario could never alter the fact that the chairman has a casting vote. Under The Companies Act power must reside somewhere. [HOPE J.A.: Not necessarily; the incorporators can agree that each shall have the same power.] I rely on *Re Stranton Iron and Steel Company* (1873), L.R. 16 Eq. 559; *Moffatt v. Farquhar* (1878), 7 Ch. D. 591. These cases are authority for the proposition that shares may be transferred to a nominee, and *a fortiori* a shareholder can assign his shares to *bona fide* purchasers notwithstanding any agreement to the contrary. A shareholder has a property right in his shares. [AYLESWORTH J.A.: He has the legal capacity to pass the property notwithstanding that by so doing he may commit a breach of an agreement. But let us assume that there is a valid and enforceable agreement *inter se* between two shareholders. You do not suggest, do you, that one of them might have a case for an injunction?] I do not need to go as far as that.

I rely also on 5 Halsbury, 2nd ed. 1932, p. 269, s. 468, note p; *Poole v. Middleton* (1861), 29 Beav. 646 at 650, 651, 54 E.R. 778.

J. J. Robinette, K.C., in reply: If, following the proposed transfer of shares, Bondi resorted to his right to a casting vote, we would be entitled to an injunction, and there would still be a deadlock. When an aggrieved person is a director and has the benefit of a pre-incorporation agreement he is entitled to use his power as a director to refuse to permit a transfer of shares that is designed to destroy his rights: *In re Smith and Fawcett, Limited, supra*.

When the English cases are considered it must be remembered that the idea of a private company was accepted in England only very recently. Every company has different articles of association and each case depends upon the interpretation of the articles. The *Georgas* case, *supra*, is based upon a very different set of facts from this case.

2. *As to the refusal of an order for rectification.*

Lewis Duncan, K.C., for the appellants: By s. 56(1) of The Companies Act shares in a company are deemed to be personal estate and are subject to transfer. The directors under the by-laws can limit, in a proper case, the right to transfer shares, but this amounts to a restriction of property rights. The real question is what is a proper case—is the right of turning shares into money to be arbitrarily restricted by the directors? [AYLES-WORTH J.A.: The real question is whether the Court should rectify the register when the Vallarios refused to approve the transfer because they thought the Bondis were trying to get control.] The motive of the transferor should not be considered: *Re Stranton Iron and Steel Company* (1873), L.R. 16 Eq. 559. These were *bona fide* purchasers; they swear that they paid for the stock. They also have a property right. Directors must exercise their powers as trustees for the company: 5 Halsbury, 2nd ed. 1932, p. 272, s. 471; *Wegenast, op. cit.*, pp. 366, 532. The Court will endeavour to interpret restrictions in favour of rights of property: *Wegenast, op. cit.*, p. 541; 3 C.E.D. (Ont.), 2nd ed. 1950, pp. 155-7.

The cases do not distinguish between public and private companies so far as the duties of directors are concerned: *Re Stranton Iron and Steel Company, supra*; *In re Imperial Starch Company* (1905), 10 O.L.R. 22 at 25; *Re Good and Jacob Y. Shantz*

& Co. Limited (1911), 23 O.L.R. 544 at 548-9; *Re Belleville Driving and Athletic Association* (1914), 31 O.L.R. 79 at 86; *In re Bede Steam Shipping Company, Limited*, [1917] 1 Ch. 123 at 135-6; *In re Copal Varnish Company, Limited*, [1917] 2 Ch. 349; *In re Hackney Pavilion, Limited*, [1924] 1 Ch. 276. Directors cannot refuse for a collateral purpose: *Moffatt v. Farquhar* (1878), 7 Ch. D. 591; *Re Bell Bros. Limited*; *Ex parte Hodgson* (1891), 65 L.T. 245 at 248-9. [HOPE J.A.: Vallario may have thought that it was in the best interests of the company to refuse approval.] That is not what he says.

To prevent a transfer there must be a majority vote against it; an equality of votes is not sufficient: *In re Panton and The Cramp Steel Company, Limited at al.* (1904), 9 O.L.R. 3; *In re Copal Varnish Company Limited, supra*; *In re Hackney Pavilion Limited, supra*.

J. J. Robinette, K.C. (*F. W. Fisher, K.C.*, with him), for the respondents, was not called on.

At the conclusion of the argument THE COURT delivered judgment orally, allowing the appeal in respect of the winding-up order and dismissing the appeal in respect of rectification of the share register, and announced that reasons in writing would be delivered later.

9th October 1951. A motion for leave to reargue the appeal in respect of the winding-up order was made by the appellants, and was heard by the same Court.

Lewis Duncan, K.C., for the applicants: Notwithstanding the judgment in *Re Michael P. Georgas Co. Ltd.*; *Arnold et al. v. Georgas et al.*, [1948] O.R. 708 at 710, [1948] 3 D.L.R. 574, 29 C.B.R. 99, I submit there is no right of appeal to this Court without leave from the order of a judge in chambers refusing to make a winding-up order. [AYLESWORTH J.A.: Why was this point not taken on the argument?] I overlooked it. There was no right of appeal in such a case in 1913, and consequently there is nothing to be preserved under s. 11 of The Judicature Act, R.S.O. 1950, c. 190. A right of appeal is a matter of substantive law, and must be given by statute: *In re The Sandback Charity Trustees and The North Staffordshire Railway Company* (1877), 3 Q.B.D. 1; *In re Rush* (1890), 28 C.L.J. 127. As to what is a final order and what is interlocutory, see *Norton v. Norton*

(1908), 99 L.T. 709; *Salaman v. Warner et al.*, [1891] 1 Q.B. 734.

All the winding-up cases hold that an applicant for an order must come into court with clean hands: *In re Cuthbert Cooper and Sons, Limited*, [1937] Ch. 392, [1937] 2 All E.R. 466 at 468.

In the alternative, I wish to speak to the form of the order. Entry of the order should be stayed until reasons for judgment are delivered or until leave to appeal to the Supreme Court of Canada is obtained pursuant to ss. 38 and 41 of The Supreme Court Act, R.S.C. 1927, c. 35, as re-enacted by 1949, 2nd sess., c. 37, s. 2. I suggest that a stay of three months would be reasonable. The order should also provide that the business may be carried on pending the further appeal; otherwise irreparable injury may result. The substratum of the business has not gone.

J. J. Robinette, K.C., for the respondents: I adopt the argument advanced by me as counsel in the *Georgas* case, *supra*. The order in appeal is clearly final in that it disposes of the rights of the parties. There is therefore a right of appeal without leave. Section 192 of The Companies Act gives jurisdiction to the Supreme Court, not to a judge of that Court as *persona designata*. In *Re Martello and Sons, Limited*, [1945] O.R. 453, [1945] 3 D.L.R. 626, there was no leave to appeal, and no one suggested that leave was necessary.

In the alternative, if leave to appeal is required, I apply now for leave *nunc pro tunc*. The Supreme Court of Canada has twice given leave in similar circumstances. Each member of this Court is *ex officio* a judge of the High Court. You all heard the original appeal, and one of you could be delegated to hear my motion for leave to appeal. It surely follows, where five judges have expressed themselves in favour of allowing the appeal, that I am entitled to leave if I need it.

The entry of the order should not be stayed. The situation since the hearing of the appeal is worse than it was before. On 1st October, after the argument of the appeal, the Bondis served a notice under s. 109(4) of The Companies Act calling a special general meeting to remove and replace the auditor and appoint an inspector. This shows that the "barrage" has not stopped. I submit that the proper course is not to stay the entry of the order, but to appoint a liquidator and give him permission to carry on the business for a reasonable time to permit of an appeal.

Lewis Duncan, K.C., in reply.

At the conclusion of the argument THE COURT delivered judgment orally, holding that there was a right of appeal without leave and dismissing the application to stay the entry of the order. However, on the application of the liquidator, or on filing his consent, the liquidator would be authorized to carry on the business as a going concern pending the application for leave to appeal to the Supreme Court of Canada, and, if leave was granted, pending the determination of the appeal, provided that the appeal was made without delay and was prosecuted with all possible speed. Costs of this application were to be paid by the appellants to the respondents.

14th November 1951. The written reasons for judgment of the Court were delivered by

AYLESWORTH J.A.:—This is an appeal by J. D. and F. A. Vallario from an order of Ferguson J. dated 10th May 1951, dismissing with costs an application for the winding-up of Bondi Better Bananas Limited under the provisions of The Companies Act, now R.S.O. 1950, c. 59. There is also an appeal by F. S. and Sadie Bondi from an order of Ferguson J. pronounced on the same date dismissing without costs an application for the rectification of the stock-transfer book and share register of the said company and for other relief. The company was duly served with the notices of motion and is therefore a party to the proceedings but, for reasons which become obvious upon a consideration of the events leading up to this litigation, was not represented before Ferguson J. or before this Court. At the conclusion of the argument of both appeals the Court allowed the appeal of the Vallarios with costs payable by the company or by the liquidator out of the company's assets and directed the winding-up of the company under the provisions of the Act and upon the usual terms and appointed Chartered Trust Company interim liquidator and dismissed the appeal by the Bondis without costs. On 10th October 1951, by leave, a motion was made by the Bondis for permission to re-argue the appeal in the matter of the winding-up of the company and for other relief. That motion was dismissed with costs payable by the Bondis to the Vallarios, but the Court directed that upon an application for the purpose, if made by the interim liquidator, or the filing of an appropriate consent by it, the interim liquidator be authorized to carry on

the business of the company as a going concern pending the disposition of an application by the Bondis for leave to appeal to the Supreme Court of Canada from the order of this Court, provided such application be made promptly, and, if leave to appeal be granted, so to carry on the business of the company pending final disposition of such appeal.

One ground only of those advanced in support of the application for leave to reargue needs to be mentioned. Briefly it was this: That the order of Ferguson J. dismissing the application for winding-up was an order made in chambers, not final in its nature, as to which leave to appeal was required to confer jurisdiction upon this Court and that no such leave was obtained. It was said that this point was overlooked by counsel for the Bondis in the argument of the appeal itself. The Court was of the opinion that this ground for leave to reargue failed: *Re Michael P. Georgas Co. Ltd.*; *Arnold et al. v. Georgas et al.*, [1948] O.R. 708 at 710, [1948] 3 D.L.R. 574, 29 C.B.R. 99; *Menary v. Menary*, [1942] O.W.N. 417, [1942] 3 D.L.R. 746. I now state the reasons which moved the Court to the disposition of the appeals as above mentioned.

Bondi Better Bananas Limited was incorporated as a private company under the Ontario Companies Act by letters patent dated 30th December 1943. The Bondis and the Vallarios have equal shareholdings in the company, which superseded an equal partnership between Mr. Vallario and Mr. Bondi. Clearly there was an understanding or arrangement that each of the partners would have such equal shareholdings in the company and participate equally in the control of the company's affairs and business. This arrangement was of the very essence of the decision to incorporate and, upon incorporation, was meticulously carried out under the provisions of the charter and of the by-laws and in the minutes of proceedings—that is to say the company was created as a private company with appropriate restrictions on the transfer of shares of the capital stock therein, the number of directors was fixed at four, the shareholders upon completion of organization were four in number, the Vallarios and the Bondis, Mr. Bondi was made president of the company and Mr. Vallario secretary-treasurer, and each was to be paid a salary of \$7,500 per annum.

The company appears immediately to have entered upon a period of marked prosperity in carrying on the business of an

importer and jobber of bananas. Shortly after the cessation of hostilities in 1945, however, and upon the re-entry into the Canadian market of certain American fruit companies, Bondi Better Bananas Limited was unable to compete successfully in the importation end of the business and was obliged to revert to the jobbing business which proved far less profitable and resulted eventually in rather large losses.

As early as 1948 dissension and criticism developed between Vallario and Bondi and in the ensuing years the situation between them deteriorated progressively until by the date of the launching of the motion for the winding-up of the company, and for some period before that date, they were mutually and openly hostile, mistrustful and abusive. Bondi, as the landlord of the premises in which the company carried on its business, demanded and eventually obtained a greatly increased rental and the methods which he employed to obtain the increase were not calculated to promote harmony, particularly as the company had fallen from its former days of high prosperity. Vallario complained of Bondi's personal use of the company's trucks and of his failure or alleged failure to attend properly to city sales. Other disputes and quarrels developed over either the past actions or the current actions of one or the other of the two regarding the conduct of the company's business. Vallario became convinced that the trend and the extent of the company's business demonstrated that it had become a "one man" business and could no longer adequately support both participants with a profitable result. Finally, late in 1949, Vallario suggested that Bondi either sell out his interests to him or buy his (Vallario's) interest, which was not acceptable to Bondi.

From that point the growing hostility and mistrust between the two men crystallized rapidly. Vallario purported to call a shareholders' meeting to consider the advisability of winding up the affairs of the company. The Bondis voted against such action. Bondi, without consultation with Vallario, discontinued consulting with him, as had been done previously, with respect to purchases of the product. Vallario countered by sending out a notice to certain suppliers that they were not to honour orders for the product unless signed by both Bondi and Vallario, discharged the bookkeeper and cancelled certain insurance. Ultimately, in May 1950, Bondi refused to sign any further salary cheques either for himself or for Vallario. Bondi previously (in

January 1950) had given notice of a directors' meeting and demanded the calling of a shareholders' meeting, respectively to approve the transfer of one of his shares to his solicitor and to condemn Vallario's actions and to consider the institution of an action against him.

I have by no means attempted to recite in detail all the moves and counter-moves emanating from the increasing hostility between the two, but it seems abundantly clear that for a considerable period before the launching of the motion for winding-up (3rd August 1950) all hope of co-operation between Bondi and Vallario in the carrying on of the business had vanished completely and this, in turn, had resulted in a deadlock as to the carrying on of such business. As an illustration of the situation it may be noted that for a considerable period of time directors' or shareholders' meetings, called by one or the other faction, either did not take place at all or if they did take place were completely abortive. Mention has been made that in January 1950 Bondi sought approval of the transfer of a share in the capital stock from himself to his solicitor. The motive for that desire on his part is, we think, revealed in his further attempt, shortly after the inception of the winding-up proceedings, to obtain approval of the directors to transfer some of his shares to the same solicitor, to one of that solicitor's associates and to his brother, with the object, as advanced by his counsel upon the hearing of the motions before Ferguson J., of proceeding as follows (I quote Ferguson J.):

"... to call a meeting of the shareholders of the corporation and, by virtue of the provision of the by-laws which enables the shareholders to remove a director during his term of office, to move at the meeting a resolution removing the Vallarios as directors and if there were, as no doubt there would be, a tie vote on such motion, to use the chairman's casting vote to carry the motion. As Bondi is the president he would be chairman of the shareholders' meeting and would cast the casting vote in favour of the motion. The Vallarios thus being removed from office, it is proposed that the two new shareholders be appointed in their place and stead, following which Bondi would have control of the board, and would be free to carry out his views and methods of doing business without hindrance on the part of Vallario."

Such action, of course, would completely destroy the arrangement for equality of control underlying the formation of the company and carried into its constitution.

I quote the well-known provision as to winding-up by order of the Court, now contained in R.S.O. 1950, c. 59, s. 192(c) :

“A corporation may be wound up by order of the Supreme Court,

“(c) where in the opinion of the court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up.”

The Court is of the opinion, upon careful consideration of the voluminous material by way of affidavits and cross-examination, that it is just and equitable to direct the winding-up of the company, and that it is in the interest of all the shareholders that such an order be made. A deadlock exists and that in itself, in the circumstances here, is sufficient warrant for the order. In our view, there is a further ground of equal application to this case. We think the principles governing the dissolution of partnerships apply to the circumstances in which these two gentlemen find themselves as equal owners of the capital stock and in equal control of this private company, and if this be so authority is not required for the proposition that “continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation” is sufficient to justify the order: Lindley on Partnership, 11th ed. 1950, p. 691. Cases such as *In re Yenidje Tobacco Company, Limited*, [1916] 2 Ch. 426; *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783, and *Re Winding up Ordinance and Re Timbers Limited*, 11 Alta. L.R. 432, [1917] 2 W.W.R. 965, 35 D.L.R. 431, support the conclusion that these principles properly may be applied to the case at bar.

The appeal of the Vallarios will therefore be allowed with costs here and of the application for winding-up made before Ferguson J., payable to the Vallarios by the company or the liquidator out of the assets of the company which shall come into its hands. The usual order will issue appointing the Chartered Trust Company provisional or interim liquidator to take charge of the company's affairs until the Master has appointed a permanent liquidator, with a reference to the Master to appoint such permanent liquidator and to take all necessary proceedings for and in connection with the winding-up of the

company. The interim liquidator, upon application by it for the purpose, or upon the filing by it of the necessary consent, will be authorized to carry on the business of the company as a going concern pending application for leave to appeal to the Supreme Court of Canada from this order, which application is to be made promptly, and, if leave to appeal be granted, pending the final disposition of such appeal.

It remains to state the reasons for the disposition of the appeal by the Bondis from the order of Ferguson J. dismissing their application for rectification of the stock-transfer book and share register of the company. The nature of and the circumstances surrounding the proposal by Mr. Bondi to transfer certain of his shares of the capital stock of the company have already been dealt with sufficiently. The question of the proposed transfers came up before a meeting of the board of directors held on 15th August 1950, at which all directors were present. The motion, of course, was lost. I quote in part from the minutes:

"Mr. and Mrs. Vallario voted against the motion as on asking Mr. Bondi's reason for wanting to transfer these shares and being told that his reason was that he wanted Mr. Bicknell to sit in on these meetings, and, failing him, then Mr. Chas. Bondi, and failing both, then Mr. Burridge, Mr. Vallario stated that in his opinion the transfer asked for by Mr. Bondi seemed to be only a ruse to give qualifying shares to his nominees in order to elect them to the board of Directors. Mr. Vallario then asked if Mr. Bondi would give him a letter, acceptable to his Solicitor, guaranteeing that at any election of Directors Mr. Bondi would vote all his shares in favour of Mr. and Mrs. Vallario. This he was not prepared to do and Mr. and Mrs. Vallario voted then against Mrs. Bondi's motion."

By s. 1(c) of the Ontario Companies Act:

"'private company' means a company as to which by special Act, letters patent or supplementary letters patent,

"(i) the right to transfer its share is restricted,

"(ii) the number of its shareholders, exclusive of persons who are in the employment of the company, is limited to fifty, two or more persons holding one or more shares jointly being counted as a single shareholder, and

“(iii) any invitation to the public to subscribe for any shares, debentures or debenture stock of the company is prohibited;”

The letters patent of the company provide in part as follows:

“AND IT IS HEREBY ORDAINED AND DECLARED that the said Company shall be a PRIVATE COMPANY and that the following provisions shall apply thereto: (1) The right to transfer shares of the capital stock of the Company shall be restricted in that no shares shall be transferred without the express sanction or approval of a majority of the directors, to be signified by a resolution passed by the board . . .”

In this Province, so far as has been made apparent, there is, with one exception, little or no authority by way of reported decisions upon the question of the right of directors to withhold their consent to a transfer of shares in the capital stock of a private company. It is to be observed, however, that the provision of The Companies Act, to which reference already has been made, defines the restrictive feature characteristic of private companies in the widest possible terms, leaving it, apparently, to the incorporators of any particular private company themselves to prescribe the nature and extent of the restrictions upon transfers of shares. It is further to be observed that the restriction contained in the charter of Bondi Better Bananas Limited is equally broad in its terms. This is not always the case; the restriction upon the right to transfer is capable of being expressed either widely or narrowly and a much narrower restriction than that appearing in the charter of this company is, or in the past at least has been, not infrequent. In *Re Phillips and La Paloma Sweets Limited* (1921), 51 O.L.R. 125, 66 D.L.R. 577, the late Mr. Justice Middleton, at p. 127, has this to say upon the right of directors to refuse a transfer of shares:

“The case law is collected and discussed in Lindley on the Law of Companies, 6th ed., vol. 1, p. 647, and it is there stated as the result that when by the constitution of the company the consent of the directors is required, ‘the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously. At

the same time, if their consent to a transfer is necessary, and, in giving or refusing their consent to a transfer, they act *bonâ fide*, with a view to the protection of the interest of the company, the exercise of their discretion will not be interfered with. . . . If the directors refuse their consent to a transfer they are not bound to state their reasons for refusal . . . ; if their conduct is questioned the onus of proving that they have acted improperly is on the person complaining of their conduct.'

"In the case of a private company the situation is not essentially different from a partnership, and it is almost impossible to imagine any case in which the Court would interfere unless some flagrantly improper motive could be shewn, e.g., an attempt by the directors to force a sale to themselves at a gross undervaluation. No suggestion of *mala fides* is here made."

We adopt this principle and, applying it to this case, we see no ground whatever for interference by the Court with the action of the board of directors in refusing the transfers in question. The incorporators of this company, in their wisdom, deemed it advisable to set up the affairs of the company and its constitution upon the basis of equal ownership and control as between the Bondis and the Vallarios. It must be conceded, we think, that in the opinion of the incorporators such an arrangement was best calculated to promote the interests and the carrying on of the business of the company. We do not think that bad faith in any sense of those words has been shown on the part of the Vallarios in refusing their consent to the transfers proposed by the Bondis.

The Court of Appeal in England in *In re Smith and Fawcett, Limited*, [1942] Ch. 304, [1942] 1 All E.R. 542, has dealt generally with the principles pertaining to this important question. We fully endorse the reasoning in that case as contained in the judgment of the Court delivered by Lord Greene M.R. (as he then was), and for the purposes of this appeal we refer particularly to one short passage appearing at p. 308:

"There is nothing, in my opinion, in principle or in authority to make it impossible to draft such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into account any matter which they conceive to be in the

interests of the company, and thereby to admit or not to admit a particular person and to allow or not to allow a particular transfer for reasons not personal to the transferee but bearing on the general interests of the company as a whole—such matters, for instance, as whether by their passing a particular transfer the transferee would obtain too great a weight in the affairs of the company or might even perhaps obtain control. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company.”

The appeal by the Bondis from the order of Ferguson J. will therefore be dismissed. The Court makes no order as to the costs of that appeal.

*Appeal by J. B. Vallario and F. A. Vallario allowed
with costs; appeal by F. S. Bondi and Sadie Bondi
dismissed without costs.*

*Solicitors for J. B. Vallario and F. A. Vallario: Ludwig, Fisher
& Holness, Toronto.*

*Solicitors for F. S. Bondi and Sadie Bondi: Duncan & Bicknell,
Toronto.*

[COURT OF APPEAL.]

Fairbanks Soap Company Limited v. Sheppard.

Contracts—Construction—Agreement for Construction and Installation of Machine—Rights of Parties—Substantial Performance—The Sale of Goods Act, R.S.O. 1950, c. 345.

Even if a contract is in form an ordinary contract for the sale of goods, the Court is entitled to determine what was the real and final agreement between the parties, as evidenced not only by the bare wording of the document itself but by the effect given to it by the parties themselves, as indicating what they originally intended, and by their subsequent agreement as contained in correspondence between them. Where it appears that the agreement was in fact one for the construction and installation of a machine by one party in the premises of the other, the contract is not one for the sale of goods but one for work to be done and material to be supplied. *Clark et al. v. Bulmer et al.* (1843), 11 M. & W. 243, applied.

In the case of such a contract the provisions of The Sale of Goods Act are inapplicable, and if there has been substantial performance of the contract by one party he is entitled to be paid the value of the work he has done and the materials he has supplied. *H. Dakin & Co., Limited v. Lee*, [1916] 1 K.B. 566, applied; *McGregor and McIntyre Co. Ltd. v. Sterling Appraisal Co. Ltd.* (1925), 57 O.L.R. 485 at 492, referred to.

AN APPEAL by the plaintiff from the judgment of Genest J., dismissing the action and awarding judgment to the defendant on his counterclaim.

18th October 1951. The appeal was heard by ROACH, BOWLBY and GIBSON JJ.A.

J. Harvey Bone, K.C., for the plaintiff, appellant: The real dispute is whether this was, as we contend, a contract for the sale of goods or, as the defendant contends, one for work to be done and materials to be supplied. [ROACH J.A.: You say that you were buying a completed machine, while the defendant argues that you entered into a contract with him that he would build you a machine?] Yes. The defendant held himself out as competent to construct a machine that would make soap-chips, and we relied on this representation. The defendant advised us that the job was finished, and it was not, and he now refuses to replace a knife which is essential to the working of the machine. Without this knife we cannot test the working of the machine, and we are not prepared to pay until we see that the machine will work properly.

There is no evidence that this is a complete machine, and the trial judge recognized that it was not complete. Not only would it not perform properly the work it was ordered for, but some of the materials incorporated in it were inferior, the machine was not properly adjusted, and there was a lack of supervision on

the part of the defendant. We required the defendant, by notice in writing, to complete the machine in 30 days, in default of which we should consider the contract cancelled. We heard nothing from the defendant.

We rely on ss. 14, 27, 33(1), 35 and 49 of The Sale of Goods Act, R.S.O. 1950, c. 345. Under s. 14 we are not bound to accept the machine because it does not comply with the contract. The contract being silent as to the time of delivery, it is to be implied that the machine was to be delivered within a reasonable time: s. 27. We have, under s. 33(1), the right to inspect and test the machine on delivery, and it was found to be incomplete when so inspected. Section 49 entitles us, the machine not being in accordance with the contract, to cancel the contract and sue for a return of our deposit and for damages.

To avoid these consequences the defendant must establish that we deliberately accepted the machine in the condition it was in. Payment being dependent upon delivery of a machine that would make soap-chips, the defendant was not entitled to payment of any part, much less all, of the purchase-price as demanded by him, and his refusal to co-operate left us no alternative but to cancel the contract. The defendant must test his machine and not merely give his opinion that it will operate.

The law respecting substantial performance is not applicable because the criterion is not the amount of material supplied, but rather the products that the machine will make, as set out in the contract. This is an "entire" contract, which can be performed only as a whole. We have never accepted or been able to use the machine.

I rely on the following authorities: *Alabastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited* (1914), 30 O.L.R. 394, 17 D.L.R. 813; *Wallis, Son and Wells v. Pratt & Haynes*, [1911] A.C. 394; *Canadian Gas Power and Launches Limited v. Orr Brothers Limited* (1911), 23 O.L.R. 416, affirmed 46 S.C.R. 636; *Schofield v. The Emerson Brantingham Implement Company*, 57 S.C.R. 203, 43 D.L.R. 509, [1918] 3 W.W.R. 434; *Wolverton Flour Mills Ltd. v. Cecutti* (1932), 41 O.W.N. 509, affirmed [1933] O.W.N. 302; *Brazeau v. Wilson* (1916), 36 O.L.R. 396, 30 D.L.R. 378; *Forman & Co. Proprietary, Limited v. The Ship "Liddesdale"*, [1900] A.C. 190; *Eshelby v. Federated European Bank, Limited*, [1932] 1 K.B. 254 at 269, affirmed [1932] 1 K.B. 423.

J. D. Arnup, K.C. (J. S. Boeckh, with him), for the defendant, respondent: The contract was one that contemplated the permanent and fixed installation of a large, heavy machine. In its essence this was not a sale of goods but a contract for work and labour and materials. The engagement was not to supply an article, but to construct a permanent and fixed addition to the plant and machinery of the plaintiff company. The importance of this distinction is that the harsh common law rule that a plaintiff who sues under a contract for the sale of goods must show complete performance, to the last degree, is not applicable to a contract for the supply of labour and materials such as this. On the contrary, substantial compliance with such a contract will entitle a plaintiff to relief, subject to the deduction of the amount required to complete the work. I rely on:

Benjamin on Sale, 8th ed. 1950, p. 167; 29 Halsbury, 2nd ed. 1938, p. 14; *Clark et al. v. Bulmer et al.* (1843), 11 M. & W. 243, 152 E.R. 793; *McGregor and McIntyre Co. Ltd. v. Sterling Appraisal Co. Ltd.*, 57 O.L.R. 485 at 489, [1925] 4 D.L.R. 211; *Diebel v. Stratford Improvement Co.* (1917), 38 O.L.R. 407 at 411, 33 D.L.R. 296; *H. Dakin & Co., Limited v. Lee*, [1916] 1 K.B. 566; *Lee v. Griffin* (1861), 1 B. & S. 272, 121 E.R. 716; *Hobson v. Gorringe*, [1897] 1 Ch. 182. I submit that *Brazeau v. Wilson* (1916), 36 O.L.R. 396 at 399, 30 D.L.R. 378, is distinguishable.

There has been no abandonment of the work by us, nor has there been such delay as would entitle the plaintiff to cancel the contract. Further, by operating the machine after a letter from the defendant saying that to do so would constitute acceptance, and by running it periodically since this action began, the plaintiff has accepted the machine.

J. Harvey Bone, K.C., in reply: We operated the machine only to keep it in working order. It is necessary to read all the evidence carefully to reach a conclusion. We made a contract to buy a machine and later asked the defendant to install it. We have a machine that will not do the work for which it was bought.

Cur. adv. vult.

29th November 1951. The judgment of the Court was delivered by

ROACH J.A.:—The plaintiff carries on business as a manufacturer of soap in the city of Toronto. The defendant is a mechanical engineer.

The parties entered into a written agreement dated 21st September 1945 in the form and terms following:

“Sheppard Engineering Enterprises,
P.O. Box 54 Adelaide,
Toronto, Ont.

Gentlemen:

“This is our official order for One Only Standard Two Section Soap-chip dryer complete with three screen conveyor sections, fans, steam coils and chain drives complete, but does not include any intake or discharge piping that may be necessary to the installation of this unit, which would be a portion of our plant arrangement. All piping to and from this machine will be supplied by us.

“One only thirty-six by seventy-one inch cast-iron standard soap-roll complete with knives, drives, steam and water connections ready for purchasers lines, and canvas apron connection to dryer.

“The dryer of this unit to be so arranged that additional sections can be added at any future time that production requirements demand.

“The type of design and the products produced of this machine is of the standard generally used and produced by all the large soap producers on this continent.

“You will cover this machine against defective parts for a period of one year from the date of installation.

“It is understood that you will deliver this machine to our plant for a price of ninety Eight Hundred Dollars (\$9,800.00) plus tax, exclusive of motors, with the provision, however, that should you effect any saving in the purchase of these parts that the machine will be proportionately lower.

“Terms of payment to be Four Thousand Dollars (\$4,000.00) cash on delivery and the balance secured by our note to you. Should we be able to increase the cash payment the amount of the note to be reduced proportionately.

“FAIRBANKS SOAP COMPANY, LIMITED

“R. G. Fairbanks, Pres.

Signature of Acceptance

“Mel. Sheppard

Witness R. M. Pennington.”

The units described in that agreement, that is, the cast-iron soap-roll with knives, drives, steam and water connections, and the two-sectioned chip-dryer with the conveyors, when set up in their proper relation to one another, constitute a complete machine for the manufacture of soap-chips from liquid soap. Of course, before the machine could be placed in operation, it would have to be connected to water and steam pipes and have the necessary power applied to it.

The defendant was not in the business of manufacturing soap-chip machines, although he had on isolated occasions built such machines. He represented to the plaintiff that because of his skill and knowledge he could build a machine that would be comparable to and just as efficient as those produced by firms all or part of whose regular business was the manufacturing of such machines.

It is abundantly clear from the record that at the time the contract was signed both parties understood that the machine would be constructed on the plaintiff's premises. Such construction involved more than merely assembling in juxtaposition a number of completed units. The component parts of each unit had to be gathered and brought to the plaintiff's plant and fitted into place and then the units thus completed had to be assembled in their proper relation to one another.

It would be difficult, if not impossible, to draw an exact dividing line between the work involved in the actual construction of the machine and the work involved in installing it. As construction progressed, there was partial installation.

It will be observed that there is no provision in the contract of purchase that provides for installation. The installation required certain additional equipment, part of which was supplied by the defendant from time to time pursuant to subsequent agreement between the parties as is evidenced by correspondence between them.

Shortly after the parties entered into the original agreement the defendant commenced the construction of the machine in the place contemplated.

On 19th November 1946, at the request of the defendant, the plaintiff paid the defendant the sum of \$1,000 as a payment on the machine "being made for [it]".

Due in part to difficulties experienced by the defendant in obtaining material, there were delays in the construction and installation of the machine, and the work extended into the year 1949. During that period the plaintiff purchased the necessary power machinery, consisting of an electric motor, pulleys and hangers, as specified by the defendant, and on instructions from the plaintiff these were installed by the defendant, the plaintiff supplying a helper to the defendant for that purpose. Numerous complaints were made by the plaintiff to the defendant about the delays in completing the construction and erection of the machine.

From correspondence between the parties, it also appears that it was in the contemplation of the parties that when the work of construction and installation had been completed, the machine would be given a trial run.

On 1st March 1949 the defendant wrote the plaintiff stating in substance that the whole job was complete, and that he was prepared to give the machine its initial trial run as soon as the first part of the payment, called for by the contract, had been made. To that letter the plaintiff replied that it was unwilling to make any further payment until it was satisfied by a test that the machine could be successfully operated, and that in the meantime the plaintiff was willing to place in escrow the balance of the contract price.

The defendant was unwilling to accede to the plaintiff's suggestion, claiming that he should first be paid and then he would turn the machine over to the plaintiff for operation. In order to ensure that the plaintiff could not operate the machine in the meantime the defendant removed a vital part from it.

Under date 25th March 1949 the plaintiff notified the defendant in writing that unless the defendant completed the contract by 30th April following it would cancel the contract and demand the return of the sum of \$1,000 which it had paid on account and reimbursement for moneys paid to its employees during the time they had worked on the machine assisting the defendant in its construction and erection, and also reimbursement for materials supplied by it.

Not having heard anything further from the defendant by 5th May 1949, and the defendant having done nothing further to the machine in the interval, the plaintiff on that date wrote the defendant purporting to cancel the contract, and demanding

repayment of the sum of \$1,000 and the sum of \$1,683.96 wages paid to its employees while assisting the defendant in the erection of the machine and also the cost of the material supplied by the plaintiff, and a further reasonable sum for the use and occupation of the floor space in the plaintiff's plant used by the defendant in the construction of the machine.

Then this action was commenced. The plaintiff claimed:

(1) a declaration that the contract was cancelled;

(2) repayment of the sum of \$1,000;

(3) the sum of \$700, being the value of the floor space;

(4) the sum of \$137.11, being the value of materials supplied by the plaintiff to the defendant;

(5) the further sum of \$355.77, being the value of materials purchased by the plaintiff (less their salvage value) and allegedly wasted by reason of the failure of the defendant to complete the machine;

(6) the sum of \$1,191.80 wages paid for labour by the plaintiff;

(7) in the alternative, the sum of \$15,000 damages for failure by the defendant to supply a machine in accordance with the contract.

The defendant, pleading, alleged that he had completed the construction of the machine in accordance with the original agreement; that he had completed its installation, in respect of which he was entitled to the sum of \$1,500; that he was entitled to the original contract price, namely, \$9,800, plus a sales tax of \$784, less \$1,000 paid on account; and he accordingly counter-claimed for the sum of \$11,584. (This must be an error in addition.)

The action was tried by Mr. Justice Genest, who dismissed the plaintiff's action with costs and awarded the defendant judgment on his counterclaim for the sum of \$10,184 and costs.

The plaintiff's claim was based on the theory (1) that it had effectively cancelled the contract; (2) that, in any event, the machine as constructed by the defendant would not do the work for which it was intended and was of no value to the plaintiff; and the plaintiff relied upon The Sale of Goods Act, R.S.O. 1950, c. 345, ss. 14, 27, 33(1), 35 and 49.

The learned trial judge held that the contract was not one for the sale of goods but was a contract to do work and furnish materials; that there had not been a total failure of consideration

but a substantial compliance with the contract; and that the defendant was entitled to be paid in accordance with the contract less the cost of completing the machine and putting it in proper working order. The sum of \$10,184 awarded to the defendant on his counterclaim was made up as follows:

Original contract price	\$ 9,800.00	
Sales Tax	784.00	
Labour which should have been provided by the plaintiff and in fact was provided by the defendant in the installation of the machine	200.00	
Installation	1,000.00	
Total		\$11,784.00
<i>Deduct:</i>		
(1) Payment by the plaintiff to the defendant	1,000.00	
(2) Cost of completing the machine and putting it in proper running order	600.00	1,600.00
		<hr/>
Balance		\$10,184.00

The plaintiff now appeals to this Court.

In my opinion, the learned trial judge was right in holding that this was not a contract for the sale of goods. It was a contract for work to be done and materials to be supplied.

In *Clark et al. v. Bulmer et al.* (1843), 11 M. & W. 243, 152 E.R. 793, the plaintiff agreed to build a steam engine of 100 horse-power for pumping the defendant's colliery, to be completed and fixed for £2,500. The engine was forwarded in parts, and fixed piecemeal at the colliery, and was made into an engine there, before the commencement of the action. It was held that that was not a contract for goods sold and delivered. Parke B., delivering the judgment of the Court, said in part:

"The engine was not contracted for to be delivered, or delivered, as an engine, in its complete state, and afterwards affixed to the freehold; there was no sale of it, as an entire chattel, and delivery in that character; and therefore it could not be treated as an engine sold and delivered. Nor could the different parts of it which were used in the construction, and from time to time fixed to the freehold, and therefore became part of it, be

deemed goods sold and delivered, for there was no contract for the sale of them as moveable goods; the contract was in effect that the plaintiff was to select materials, make them into parts of an engine, carry them to a particular place, and put them together, and fix part to the soil, and so convert them into a fixed engine on the land itself, so as to pump the water out of a mine."

There is this distinction between that case and the case at bar, namely—in that case the original written agreement called for the engine to be built and completed and affixed to the freehold. In the case at bar the original written agreement on its face covered merely the sale and purchase of the machine. As already pointed out, however, although the contract is silent with respect to installation, that is, the affixing of the machine, the construction of the machine as intended by the parties involved partial installation, and by subsequent agreement between the parties the whole work of installation was to be completed, the plaintiff supplying part of the necessary additional labour and equipment and the defendant the rest. In my opinion, this distinction between *Clark et al. v. Bulmer et al.* and the case at bar does not affect the result. On its face the original contract between the parties in the case at bar was a contract for the sale of goods, but it is open to the Court to determine the real and final agreement between the parties as is evidenced not alone by the bare wording of that original contract but by the meaning and effect which the parties themselves gave to it as indicating what they originally intended and by their subsequent agreement as contained in the correspondence. Judged by all those criteria the real and final agreement between them was not an agreement for the sale of goods but, like the contract in *Clark et al. v. Bulmer et al.*, was an agreement covering work to be done and material to be supplied. The product produced thereby was not a chattel as such, but an addition to the plaintiff's plant and equipment integrated into and becoming a part of the whole.

Then was there substantial compliance with that real and final agreement by the defendant?

On 3rd May the plaintiff, having first obtained, elsewhere than from the defendant, the vital part which the defendant had removed from the machine, installed it and made a test run of the machine. Without detailing the results, it will suffice to say that they were not satisfactory.

At the trial the plaintiff led evidence from an expert who examined the machine and testified that in his opinion the machine as a soap-chip machine was valueless. The plaintiff also led evidence as to the result of the test run.

As opposed to that evidence, the defendant led evidence of experts who, while admitting that there were some defects in the machine, testified that they could be remedied without excessive costs and that when they were remedied the machine would operate efficiently.

As between those two sets of experts, it appears to me that the experts called by the defendant were the better qualified to express an opinion as to this particular type of machine. In contrast to the expert called by the plaintiff, the experts called by the defendant had experience—some more than others—with such machines and their operations and the products produced thereby. In any event, the learned trial judge has accepted the expert evidence given on behalf of the defendant and found as a fact that there was substantial compliance, and I am not prepared to interfere with that finding.

On the question of substantial compliance, the case of *H. Dakin & Co., Limited v. Lee*, [1916] 1 K.B. 566, is a leading case. The law was there laid down by Ridley J. in the Divisional Court—and the judgment of the Divisional Court was sustained on appeal—in the following language:

“It seems to me, however, from the authorities that where a building or repairing contract has been substantially completed, although not absolutely, the person who gets the benefit of the work which has been done under the contract must pay for that benefit. On the other hand, if the builder has refused to complete his work, or if the work done is of no use to the other party, or if the work is something entirely different from what was contracted for, then the builder can recover nothing.”

That was a case arising out of a contract to execute repairs to a house, but the principle as enunciated by Ridley J. is not limited in its application to contracts of that sort. It was applied in this Court in *McGregor and McIntyre & Co. Ltd. v. Sterling Appraisal Co. Ltd.*, 57 O.L.R. 485, [1925] 4 D.L.R. 211 (a case of a contract of appraisal) and, as Masten J.A. pointed out at p. 492, it had been previously adopted and applied in the Courts of Ontario and other parts of the Dominion in cases involving architects, solicitors and others.

On evidence which the learned trial judge obviously accepted, if certain adjustments are made to this machine and some additional minor parts are added thereto, it will be capable of manufacturing soap-chips for either commercial or domestic use. The fact that the defendant, having, as he alleged, completed the job, removed a vital part to prevent the plaintiff testing the machine pending payment was not a refusal on his part to complete the job. A refusal to complete means an abandonment of the work. I think the defendant was most unreasonable in the attitude he took in removing the vital part, but it did not amount to an abandonment of the work.

The principle stated in *H. Dakin & Co., Limited v. Lee, supra*, is simply this, that the person who has done the work and/or supplied the materials should be paid what he deserves for what he has done. Here the trial judge has arrived at an amount of which he concluded the defendant was deserving, by deducting the sum of \$600 as the cost of making the necessary adjustments and adding the necessary parts to put the machine in proper running order. The evidence as to the amount it would cost in labour and material to overcome the deficiencies in the machine is so meagre that if it were in issue in this appeal I would find it impossible to say whether the amount of \$600 allowed for that purpose was reasonable or not, but that question is not in issue in this appeal. It is not one of the grounds of appeal contained in the notice of appeal. The defendant (respondent) argued that it was reasonable, and is satisfied with the amount allowed. It was not suggested in argument by counsel for the plaintiff (appellant) that, if this Court should hold that there was substantial compliance by the defendant the cost of the necessary adjustments and additional parts as found by the trial judge was unreasonable.

There is a further question which, if it were in issue in this appeal would be difficult to resolve, but it is not in issue. It is this: The original contract called for the payment of \$4,000 in cash on delivery and the balance of the contract-price was to be secured by the plaintiff's promissory note. The contract is silent as to the manner of payment of that note. There is some evidence that it was in the contemplation of the parties that the note would be payable in instalments of some amount, each, but that is all. It was not suggested by counsel for the plaintiff during his argument in this Court that if this Court should find

that the plaintiff was indebted to the defendant in some amount that amount, whatever it might be, was not all presently due. Nor is such a contention contained in the notice of appeal, nor is there any such allegation contained in the pleadings.

For the foregoing reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: J. Harvey Bone, Toronto.

Solicitors for the defendant, respondent: Mason, Foulds, Arnup, Walter & Weir, Toronto.

[COURT OF APPEAL.]

Segraves (otherwise Fralick) v. Fralick.

Judgments—Default Judgment—Action for Declaration of Nullity of Marriage as Bigamous—Default Judgment not to be Granted where Implied Admission Relates to Question of Law—Rules 2(i), 261, 354, 355, 356.

Rule 354, providing that a defendant who does not deliver a statement of defence shall be deemed to admit all the statements of fact set forth in the statement of claim, is expressly limited to allegations of fact. In order to succeed in an action a plaintiff must show that the facts proved are sufficient and of such a character that they bring the case within the rules of law that are to be applied: Rule 261. In an action for a declaration of nullity of marriage on the ground of a prior subsisting marriage of one of the parties that marriage must be strictly proved, and it would be dangerous to grant a decree on admissions alone, without a trial of the action. While it is true that the effect of Rule 2(i) is that an action for annulment of marriage (whether as void *ab initio* or merely as voidable) is outside the scope of the Rules relating solely to matrimonial causes, and subject only to the Rules relating to ordinary civil actions, there is no magic in Rule 354, in conjunction with Rule 2(i), that will compel the Court in such an action to act on allegations made by a plaintiff that become admissions of fact by virtue of Rule 354. *McIntosh (otherwise Thompson) v. Thompson*, [1950] O.W.N. 588, overruled; *Beckman v. Beckman*, [1950] O.W.N. 675; *Wright (falsely called Lineaweaver) v. Lineaweaver*, [1950] O.W.N. 829, considered.

Divorce and Matrimonial Causes—Declaration of Nullity of Marriage as Bigamous—Nature of Judgment—Absence of Discretion—Care to be Exercised by Court—Inapplicability of Matrimonial Causes Rules—Rule 2(i).

While a plaintiff who sues for a declaration of nullity of marriage on the ground that it was bigamous is entitled to judgment *ex debito justitiae* if the facts support the claim, and the Court has not the discretion usually associated with declaratory judgments, yet, such a judgment being one *in rem*, great care should be exercised to see that the case is sufficiently made out before a judgment is pronounced.

A MOTION for judgment, referred by Schroeder J. to the Court of Appeal under s. 32 of The Judicature Act, R.S.O. 1950, c. 190.

15th November 1951. The motion was heard by HOGG, AYLESWORTH and GIBSON JJ.A.

R. M. Willes Chitty, K.C., for the plaintiff, applicant: The new definition of "matrimonial cause" in Rule 2(i) has the effect of taking an action for annulment of marriage, whether the claim is that the marriage was void *ab initio* or only that it is voidable, outside the scope of the Rules relating expressly to matrimonial causes. Schroeder J. properly so found, and treated such an action as an ordinary civil action, in *McIntosh (otherwise Thompson) v. Thompson*, [1950] O.W.N. 588. Gale J. in *Beckman v. Beckman*, [1950] O.W.N. 675, did what the Rules say is not to be done—he in effect held that the Rules respecting matrimonial causes were applicable. In *Wright (falsely called Lineaweaver) v. Lineaweaver*, [1950] O.W.N. 829, there was the additional factor of domicile, and Chevrier J. pointed out that while default of defence constituted an admission of the facts alleged, under Rule 354, domicile was a mixed question of law and fact and Rule 354 could not operate.

The result of taking these actions out of the scope of the Rules respecting matrimonial causes has been to make the measure of justice very variable. Schroeder J. accepted the change at its face value and treated the matter as if it were an ordinary civil action. Gale J. and Chevrier J. did not so treat it; they could not lose sight of the fact that an action for nullity is in ordinary parlance a matrimonial cause, although the Rules expressly provide that it is not.

[HOGG J.A.: Rule 354 simply says that if there is no defence the defendant is deemed to admit all the allegations of fact. The Court might say it wanted more than that, and would surely have the right to ask for more evidence.] I submit not. The Rules make the facts set out in the statement of claim conclusive. The only question with which the Court is concerned is whether these facts entitle the plaintiff to the judgment for which he asks. If the Court does not so find on a summary motion, the case is set down for trial, at which time the plaintiff would be entitled to judgment. The judgment in such an action as this is not a judgment *in rem*, but one *inter partes*.

In the interest of the profession there should be an authoritative decision on this question.

Cur. adv. vult.

29th November 1951. The judgment of the Court was delivered by

HOGG J.A.: On the 27th September 1951, the plaintiff, Charlotte May Segraves, brought action in the Supreme Court of Ontario claiming that the purported marriage between herself and the defendant Homer Gilbert Fralick be declared to be null and void. The plaintiff delivered a statement of claim upon the same day as the issue of the writ. No appearance was entered by or for the defendant, neither did he deliver a statement of defence, and the pleadings were noted closed. The statement of claim reads as follows:

"1. The plaintiff was at the time of the purported marriage hereinafter referred to and still is an unmarried woman, residing at the City of Toronto, in the County of York, and the defendant resides at the City of Toronto, in the County of York.

"2. On the 3rd day of December, 1949, the parties went through a form of marriage at the City of Toronto.

"3. At the time of the said marriage, the defendant represented himself to be an unmarried man, but was, in fact, already married, having been married on the 3rd day of December, 1937, to one, Phyllis May Festerzzie, who now resides in the City of Toronto, the said marriage of the defendant and the said Phyllis May Festerzzie never having been legally dissolved.

"4. There have been no children of the purported marriage between the plaintiff and the defendant.

"5. The plaintiff, therefore, claims:

"(a) A declaration that the said purported marriage, of December 3rd, 1949, is null and void;

"(b) Her costs of this action;

"(c) Such other and further relief as this Court may deem just."

On the 30th October 1951 the plaintiff moved for judgment pursuant to Rule 356 of the Rules of Court. The motion came on for hearing on the 31st October 1951, before Mr. Justice Schroeder, who heard argument by counsel for the plaintiff, no one appearing to oppose the motion, and the learned judge thereupon referred the matter to the Court of Appeal for con-

sideration pursuant to s. 32 of The Judicature Act, R.S.O. 1950, c. 190. The reason for such disposition of the motion was stated by Schroeder J. to be that he had previously, in the case of *McIntosh (otherwise Thompson) v. Thompson*, [1950] O.W.N. 588, granted a similar application upon the ground: "that since actions to declare the invalidity of a marriage had been removed from the category of matrimonial causes by Rule 2(i), actions falling within that clause were to be dealt with as ordinary civil actions; that if it was intended that judgment in such cases should only be granted after a trial, the Rules of Practice should have so provided." The learned judge further stated that subsequent to the judgment in *McIntosh v. Thompson*, judgments were given by Mr. Justice Gale in the case of *Beckman v. Beckman*, [1950] O.W.N. 675, and by Mr. Justice Chevrier in *Wright (falsely called Lineaweaver) v. Lineaweaver*, [1950] O.W.N. 829, which appeared to be in conflict with the judgment given in the *McIntosh* case.

Rule 2(i) reads as follows:

"'Matrimonial Cause' shall mean any action under the provisions of 'The Divorce Act (Ontario) 1930' other than an action to declare the invalidity of a marriage."

Rule 354 provides: "A defendant who fails to deliver a statement of defence and against whom the pleadings have been noted as closed, shall be deemed to admit all the statements of fact set forth in the statement of claim."

Rule 355 states: "Where a plaintiff would be entitled to sign judgment for default of appearance to the writ he shall be entitled to sign a similar judgment, *mutatis mutandis*, for default of defence."

Rule 356 is in the following language:

"(1) In any other case the plaintiff may after the pleadings have been noted as closed move for judgment upon the statement of claim.

"(2) Where default is made by one defendant and the action proceeds to trial as against another defendant such motion may be made at the trial."

In *Beckman v. Beckman*, *supra*, Gale J. said he did not intend to follow the decision of Schroeder J. in the *McIntosh* case. The principal reasons for his dismissal of the motion were, first, that Rule 356 was not mandatory but merely per-

missive and that the Court should not in a case of this kind, where a declaration of nullity of marriage is requested, grant judgment upon a motion merely because default had been made by the defendant in entering an appearance and filing a defence. The learned judge said that:

“The question whether or not a marriage is valid is a matter of public concern far transcending the private interests of the two parties to the action, and, that being so, the Court should proceed most cautiously before it disturbs rights and obligations which may have been created by reason of the purported marriage.”

He also expressed the opinion that there should be definite proof of the identity of the person served with the proceedings and that *viva voce* evidence should be heard clearly proving the prior marriage, which should not be established by the operation of Rule 354 only, and that a judgment should not be pronounced which involved the exercise of a judicial discretion except upon evidence taken *viva voce*.

In *Wright v. Lineaweaver*, *supra*, Mr. Justice Chevrier dismissed a similar motion in an action for a declaration of nullity of a marriage, in which no appearance had been entered or defence filed by the defendant. The learned judge who heard the application was of the opinion that an action to declare a marriage null and void was not governed by the provisions of the Rules of Practice pertaining to actions within The Matrimonial Causes Act, now R.S.O. 1950, c. 226. He was further of the opinion that Rule 354 related only to statements of fact and that the question of domicile, which was in issue in the matter before him, was one not merely of fact but of law as well. Mr. Justice Chevrier thought that, the matter being of more than an ordinarily serious nature, the degree of proof should be of considerable weight and the declaration claimed should not be granted without hearing *viva voce* evidence. I conclude that when it was said in both the *Beckman* case and the *Wright* case that judgment should not be given except upon evidence given *viva voce*, what was meant was that it was only after a trial of the actions that judgment should be pronounced.

The problem with which the Court is confronted by this reference is an interesting one.

By The Divorce Act (Ontario) 1930, (Can.), c. 14, passed by the Dominion Parliament, the law of England pertaining to the dissolution of and the annulment of a marriage, as that law existed on 15th July 1870, was, subject to certain provisions in the Act contained, introduced into the Province of Ontario, and the Supreme Court of the Province was given jurisdiction for all purposes of the Act. The Court has jurisdiction, *inter alia*, to pronounce a declaratory judgment that an alleged marriage is null and void where it is found that before such marriage the defendant had legally married another person, that such other person was alive at the time of the second ceremony of marriage, and that the prior marriage had not been validly dissolved or annulled. One of the requisites of a valid marriage is that there should not be a prior lawful subsisting marriage of either of the parties with any other person. If this requisite is not present, the marriage is void *ab initio* and not merely voidable at the instance of one of the parties thereto: *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29; Rayden on Divorce, 5th ed. 1949, pp. 43-4.

Rule 2(i) was made on the 5th November 1948, and was published in the Ontario Gazette on the 11th December 1948. This amendment to Rule 2 would—as was held by Mr. Justice Schroeder in the *McIntosh* application—place actions for annulment of marriage, whether the claim is that a marriage is void or that it is voidable, outside of the scope of the Rules relating solely to matrimonial causes. I agree with Schroeder J. on this point. Those special provisions set out in the Rules relating to matrimonial causes are not now applicable to actions for annulment of marriage, and such actions are governed solely by the Rules relating to ordinary civil actions. It does not seem to be necessary to discuss the question of whether or not an action to annul a marriage should be regarded in the same light as an action for dissolution of marriage. There are elements entering into an action for annulment that do not pertain to an action for dissolution of marriage. A marriage, if it is void *ab initio*, has never been a valid marriage. It would appear, therefore, as a matter of logic, that a marriage which has never existed could not be dissolved. An action for a declaration that a marriage is voidable has some of the characteristics of an action for dissolution of marriage in that

the marriage remains in full force and virtue until a decree of nullity is pronounced and becomes unimpeachable on the death of either party; *Inverclyde v. Inverclyde*, *supra*. However, when a decree of nullity has been pronounced the marriage is to be regarded as void *ab initio*, although not for all purposes; matters done during the period of the marriage before annulment cannot be undone or reopened: *Dodworth v. Dale*, [1936] 2 K.B. 503, [1936] 2 All E.R. 440; *In re Eaves*; *Eaves v. Eaves*, [1940] Ch. 109, [1939] 4 All E.R. 260.

I think the issue to be determined on the present reference narrows down to the question whether a decree annulling the marriage ceremony should be granted or, as is contended by counsel for the plaintiff, must be granted, upon the evidence furnished by the admissions made such by virtue of the provisions of Rule 354, or whether certain further evidence is essential before the declaration claimed can be made. In other words, it seems to me that the question is whether the relief claimed should be granted solely upon the evidence furnished by the operation of Rule 354, that is to say, upon the admissions alone of the defendant as contained in the allegations set out in the several paragraphs of the statement of claim, or whether further evidence is required before it can be determined that the facts bring the matter within the governing principles of law.

It was argued with force by Mr. Chitty that the Court was bound to grant the relief requested, upon the motion brought under Rule 356, upon the evidence furnished by the allegations in the plaintiff's statement of claim, which became admissions on the part of the defendant by virtue of Rule 354. He contended that in the present instance there is a conclusive admission of the facts and the Court is not warranted in requiring any further or other evidence, and must base its decision upon such admission.

I take this submission to mean that the allegations of fact made by the plaintiff, which are admitted, must be regarded as sufficient proof of her right to the relief claimed. This Rule deals with facts alone. In order to succeed the plaintiff must establish that the facts that are proved are sufficient and of such a character that they bring the case within the rules of law which must be applied.

In *Williams v. Powell*, [1894] W.N. 141, Kekewich J. said that a declaratory judgment ought not to be made on admissions of the parties, but I do not think the present case can be disposed of on the strength of this pronouncement alone.

Whether a marriage is valid or not is a mixed question of law and fact. With reference to Rule 354, Holmstead & Langton's Ontario Judicature Act, 5th ed. 1940, p. 1064, makes the following comment:

"On a motion for judgment under this Rule, though the facts alleged in the statement of claim are to be taken as true, it is nevertheless open to a defendant in default to contend that upon those facts the plaintiff is not in law entitled to the relief claimed."

It is stated that the Rule, in effect, introduces the old Chancery practice of a judgment *pro confesso*. In *Greig v. Green* (1857), 6 Gr. 240, it was held that a defendant appearing at the hearing, and waiving all objection to an order *pro confesso*, may show that the bill is open to demurrer for want of equity.

I think that the provisions of Rule 261 have been overlooked in the discussion of this particular subject. This Rule reads: "A party shall not be entitled to judgment at the trial or on motion on the ground of his pleading being true, if the facts proved are not sufficient in point of law to entitle him to judgment."

In *The "Peerless"* (1860), Lush. 103, 167 E.R. 53, the Judicial Committee of the Privy Council said that an admission in the pleadings in the case extended to matters of fact but not of law.

In *Chilton v. Corporation of London* (1878), 7 Ch. D. 735, the plaintiff moved for judgment on admissions in the defendants' pleadings. It was held that the admission of a right by the defendants' pleading, if such right could not be supported in law, could not entitle the plaintiff to judgment merely because the defendant did not deny the right; the Court was bound to give judgment according to law.

Order 32, Rule 6, of the English Rules of Practice provides for an application to the Court for judgment upon admissions of fact.

Chevrier J. in the *Wright* case, *supra*, recognized that the issue concerning the validity of a marriage depends upon questions of law as well as matters of fact.

In *Grant v. Knaresborough Urban District Council*, [1928] Ch. 310, the plaintiff commenced action for a declaration that a certain form of return required under The Rating and Valuation Act, 1925, was illegal and *ultra vires*. The defendants delivered a defence which they afterwards withdrew. It was held that the plaintiff could not have obtained the declaration on a motion for judgment in default of defence since evidence as to the invalidity of the form was necessary and such evidence could be obtained at a trial of the action.

In *Reg. v. Ray* (1890), 20 O.R. 212, it was held that upon an indictment for bigamy the first marriage must be strictly proved as a marriage *de jure*. The judgment of the Court was delivered by Armour C.J., who held that the evidence of a confession made by the accused of his first marriage was not sufficient, and he further said: "It is not a good thing to allow looseness of proof. A marriage in law must be strictly proved."

In *Reg. v. Savage* (1876), 13 Cox C.C. 178, an accused was convicted of bigamy upon evidence of his own confession thereto. On appeal it was held the evidence was insufficient and the conviction was quashed. It was said that a marriage must be strictly proved.

The only allegation in the statement of claim with reference to the prior marriage is that the defendant had been married on the 3rd December 1937 to one Phyllis May Festorzzie, who now resided in Toronto, and that this marriage had never been legally dissolved. There is no evidence furnished by this admission as to where the marriage ceremony was performed or whether it was one that could create a real and valid marriage, nor is there any evidence from which this circumstance might be inferred. There is no evidence of the existence of a marriage certificate giving the particulars of the marriage or evidence that the marriage ceremony had been performed by a clergyman or other person authorized to perform such ceremony.

With reference to the subsequent purported marriage ceremony, there is nothing alleged in the statement of claim other than that the parties to the action went through a form of marriage at the city of Toronto. There are no particulars

given, but only the bald statement of the plaintiff that she and the defendant went through a form of marriage. If the second marriage ceremony was fictitious, as, for example, if a person not authorized by law to join a man and a woman in the bonds of matrimony purported to officiate, the question would arise whether the Court would be justified in granting the declaration requested.

It is alleged and admitted by the defendant that the marriage of the defendant and the third person had never been legally dissolved. This is a question of law as well as of fact if proceedings had at one time been instituted for divorce. The allegation is not that proceedings had never been taken to dissolve the prior marriage, and, as it stands, the inference might possibly be drawn that proceedings had been taken which did not result in the legal dissolution of the marriage. There is no evidence on this particular matter.

It is true that several of the above-mentioned cases are concerned with the criminal law, but they lend assistance in a consideration of the question of the sufficiency of admissions only as a proof of marriage, a matter which must be clearly established. It has been held that a declaratory decree is discretionary but this principle does not appear to be the rule with respect to an action to declare a marriage void because of the prior subsisting marriage of one of the parties.

In *Bateman v. Bateman* (otherwise *Harrison*) (1898), 78 L.T. 472, a petition was brought for a declaration that a marriage ceremony was null and void on the ground that the respondent had a husband living at the time of such ceremony. The headnote of the report of that case reads: "A petitioner is entitled *ex debito justitiae* to a declaration of nullity of marriage when the respondent's husband was alive at the time of the second marriage, and the court has no discretion as to withholding relief." Barnes J., who was afterwards Lord Gorell, President of the Divorce Division and subsequently of the House of Lords, said: "It is not a matter of discretion. I have no option." This judgment has been followed in our Courts in *Grassick v. Grassick*, [1935] O.R. 50, [1935] 1 D.L.R. 351; *Welsh v. Bagnall*, [1944] O.R. 526, [1944] 4 D.L.R. 439, and *Saari v. Nykanen*, [1944] O.R. 582, [1944] 4 D.L.R. 619.

In *Grassick v. Grassick*, *supra*, the action was brought for a declaration that a purported marriage in Ontario between the plaintiff and the defendant was a nullity because the defendant was previously married in California. Certain evidence was placed before the Court including admissions made by the defendant. Mr. Justice Kerwin, who tried the action, held that the plaintiff was entitled *ex debito justitiae* to a declaration of nullity if the evidence warranted it, but the action should be dismissed because of insufficient proof of the alleged prior marriage of the defendant. The learned judge said at p. 52:

"It is true that the strictness of proof of a prior marriage demanded in a prosecution of bigamy is on a higher standard than that required in civil suits; *Spivack v. Spivack* (1930), 46 T.L.R. 243; but I consider it would be extremely dangerous to grant the decree asked for in this case on these admissions only, and the action must therefore be dismissed."

In *Leigh v. Leigh*, [1937] O.R. 239, [1937] 1 D.L.R. 773, an appeal was taken from a judgment dismissing an action for a declaration that the marriage of the plaintiff was void on the ground that the defendant, at the date of such marriage, was legally married to another woman. Mr. Justice Middleton, who delivered the judgment of the Court, said at p. 242:

"As a decree of nullity by reason of bigamy, is in the nature of a judgment *in rem* I think it would be very rash for this Court, in the circumstances that here exist, to assume jurisdiction so to declare."

In *Bates v. Bates*, [1937] O.W.N. 635, Mr. Justice Makins followed *Leigh v. Leigh* in holding a decree of nullity of a marriage, because of a prior marriage, to be of the nature of a judgment *in rem*.

These decisions followed that of the House of Lords in *Salvesen or Von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, where it was said that a judgment declaring a marriage void is the equivalent of a judgment *in rem*, for the reason that it affects the status of the parties.

I have come to the conclusion that a judgment declaring the marriage ceremony purported to be performed on the 3rd December 1949 null and void could not be pronounced solely upon the evidence furnished by the admissions of fact made by the defendant. In such an action the prior marriage must be strictly proved, and it would be dangerous to grant a decree on

admissions only, and without a trial of the action. There is no magic in Rule 354 in conjunction with Rule 2(i) that would compel the Court to act on allegations made by a plaintiff which become admissions of fact by a defendant by virtue of Rule 354, in an action to declare a marriage void.

If the action is set down for trial the plaintiff will have the opportunity to offer further evidence, which may be sufficient to fulfil the requirements of the law applicable to the matter in issue. The motion for judgment should stand over until the trial of the action. I do not think this is a case for costs.

Order accordingly.

Solicitors for the plaintiff: MacGregor & Wilson, Toronto.

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